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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 75-7

THE GREAT NORTHERN RAILWAY COMPANY AND THE NORTHERN PACIFIC RAILWAY COMPANY, CORPORATIONS,

Petitioners,

vs.

THE PULLMAN COMPANY, A CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to review the judgment of that Court entered on April 17, 1975. That judgment reversed a judgment entered by Judge McLaren of the District Court for the Northern District of Illinois. Chief Judge Fairchild dissented from the judgment of the Court of Appeals.

OPINION BELOW.

The opinion which incorporates the findings of the District Court was not reported. It is contained in the Appendix hereto. The opinion of the Court of Appeals for the Seventh Circuit is not yet reported in the Federal Reporter. It is incorporated in the Appendix hereto.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit sought to be reviewed was entered on April 17, 1975. A timely Petition for Rehearing was denied on May 21, 1975.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED FOR REVIEW.

In this case, the District Court held that, under a contract known as the Uniform Service Contract between Respondent Pullman and the Petitioners, Pullman was only entitled to reimbursement from Petitioners for separation payments made to its employees if such payments constituted "operating expenses" to Pullman as that term is defined and applied in accounting. The District Court further found that separation payments by Pullman to its employees, which were occasioned by the cessation of Pullman's operations, or its non-operations, were not "operating expenses" as that term was used in the Uniform Service Contract and is employed in accounting, and hence were not reimbursable to Pullman.

In reviewing the judgment and findings of the District Court sitting without a jury, can a Court of Appeals set such findings aside where they were based upon (1) expert accounting evidence and (2) the undisputed accounting practices of Pullman with respect to analogous accounting questions, without a showing, or even an assertion, that such findings were clearly erroneous as is required under the provisions of Rule 52(a) of the Federal Rules of Civil Procedure?

STATEMENT OF THE CASE.

In 1949, Respondent, The Pullman Company, executed the Uniform Service Contract ("USC") with virtually all of the railroads in the United States which then offered sleeping car service. That contract required each of the railroads to reimburse Pullman to the extent Pullman's "operating expenses", "rental for cars", and "taxes" exceeded its "operating revenues" in conducting sleeping car service.

In 1968 and 1969, those railroads which still remained parties to the contract withdrew from it as they had the right to do. Pullman then terminated all of its business and operations. This cessation, and Pullman's anticipation of it, resulted in the termination by Pullman of all of its employees. Most of those employees were paid a separation allowance. These payments totaled $14.9 million. Pullman classified these separation payments as "operating expenses" under the USC and then billed the railroads to recover the amounts so paid. Petitioners Great Northern and Northern Pacific contested such billings on the ground that the payments were costs attributable to the cessation of Pullman operations and hence not operating expenses. Petitioners were sued for such unpaid billings. The petitioners denied liability and counterclaimed for the recovery of amounts paid to Pullman for separation allowances. District Judge McLaren found for the petitioners, holding that certain separation payments were not reimbursable operating expenses under the USC. A statement of the facts underlying the District Court's holding follows.*

* Record references are employed herein as follows: "A" means the printed appendix in the Court of Appeals for Great Northern and Northern Pacific; "PX" means Plaintiff's exhibit; "DX" means Defendants' exhibit; "Cert. App." means the appendix to this petition.

The Purchase of Pullman Capital Stock by the Railroads and the Uniform Operating Contract.

The United States, in 1940, filed suit under the Sherman Act against Pullman, Inc. and its wholly owned subsidiaries Pullman-Standard, a manufacturer of sleeping cars, and Pullman, which furnished, manned, and serviced sleeping cars. The Court found that all three defendants had engaged in a monopoly in violation of the Sherman Act. *United States* v. *Pullman*, 50 F. Supp. 123, 132-134 (E. D. Pa., 1943). In May, 1944 a decree was entered requiring Pullman, Inc. to divest itself either of Pullman-Standard or Pullman (A. 114-116). Pullman, Inc., elected to divest itself of Pullman, and it proposed to sell to the railroads its capital stock and the sleeping car business.

While the order of the District Court approving the proposed sale (64 F. Supp. 108) was being appealed to the Supreme Court, the buying group of railroads submitted a proposed operating contract, which was designated "Uniform Operating Contract" ("UOC"), to the Interstate Commerce Commission to obtain approval of its as a "pooling agreement".* After the Supreme Court affirmed the decree approving the sale (330 U. S. 806), the ICC approved the UOC, finding that each of the 59 railroads had assented to its terms (268 I. C. C. 473). On June 30, 1947, Pullman's capital stock was sold to the 59 railroads who purchased that percentage of stock which was equivalent to their percentage of use of Pullman service during the year 1940 (A. 118).

The UOC specified the method of accounting between Pullman and each of the railroads with respect to revenues and expenses of operation. It provided that Pullman should retain from its "gross earnings" in each contract year the total of its expenses of operation plus an interest return on Pullman's investment in cars operated. It further provided that if earnings exceeded ex-

* The complete text of the Uniform Operating Contract appears at pp. 1-22 of Pullman's Appendix in the Court of Appeals.

penses of operation and interest, the overage would be divided equally between Pullman and the railroad, but that if expenses of operation and interest exceeded earnings, then the railroad would pay to Pullman the amount of the deficiency. The term "expenses of operation" was defined to include "all of Pullman's expenses of *conducting* its sleeping car business, except the cost of maintaining and operating air conditioning apparatus. . . ." Emphasis supplied. (A. 118-119.)

In early 1949, a new contract, known as the Uniform Service Contract ("USC"), was submitted to the ICC for its approval. The Commission approved the USC, and it became effective July 1, 1949 (276 I. C. C. 5). The USC, as amended, provided that for each year "Pullman shall furnish a statement . . . of revenues, expenses, and a 3% return on Pullman's investment . . ., in accordance with Appendix A attached to and made a part of this contract." It required that: "If for any Contract Year the expenses allocated to the Railroad plus a 3% return on Pullman's investment . . . shall exceed the revenues allocated to the Railroad, the Railroad shall pay to Pullman the amount of the deficiency."

Appendix A to the USC provided that:

> "Expenses to be accounted for under this contract shall include the following:
>
> (A) Operating Expenses
>
> (B) Taxes other than Federal Taxes on Income
>
> (C) Rental for Cars"

After providing for the segregation of actual expenses into 10 cost groups, the appendix required that:

> "[E]ach of [such] groups shall include direct and indirect expenses pertaining thereto, . . . as provided for in Pullman's 'Classification of Accounts' as prescribed by the Interstate Commerce Commission." (Pullman's App. 34-35, 79-80).

Under the USC each railroad had the right, upon the giving of 6 months notice, to completely withdraw from and cancel

the contract. Railroads also had the right to withdraw partially, or take over from Pullman the actual operation of the cars while leaving the maintenance and shopping of cars with Pullman.

Reduction in USC Operations and Job Protection Demands by Pullman Unions.

In the 1950's, as the public turned from railroad service to other modes of intercity transportation, Pullman's operations under the USC were reduced. That reduction of Pullman operations, magnified by the determination of many of the railroads to go out of the passenger business, was to continue without interruption (A. 11-12, 120, PX 3). As a consequence, a substantial disparity arose between the percentage of stock ownership of many of the railroads and their respective percentage of use of Pullman service. After 1958 the New York Central, which in the 1940's had accounted for approximately 15% of use and accordingly owned 15% of the capital stock of Pullman, no longer accounted for any material use of service (PX 3).

The reduction in service, and withdrawals from Pullman operations by the New York Central and others, resulted in the termination from employment of large numbers of Pullman employees (A. 12, PX 3). These terminations were followed by union demands on Pullman for job protection.

In 1960, the conductors' union demanded protection for its members in the event of terminations of the USC. After the procedures required by the Railway Labor Act had been exhausted, the conductors authorized a strike to begin on April 12, 1962 (A. 124-125, Stip. Ex. Q). Pullman obtained first a temporary and then a permanent injunction preventing any strike (A. 125). That judgment was reversed (316 F. 2d 556), and the injunction was dissolved in October, 1963; but in the interim the conductors commenced litigation described hereafter which effectively prevented for some time further withdrawals from the USC.

Shortly after the conductors' strike had been enjoined, the Pennsylvania notified Pullman that effective October 1, 1962 it would "partially withdraw" from the USC on its local lines.* Pennsylvania was then the largest user of sleeping car service, accounting for more than 15% of Pullman's operations. In the sense used by Pennsylvania, and later by other railroads who did likewise, a partial takeover or withdrawal from the USC resulted in the railroad assuming the operation of the sleeping cars while leaving with Pullman the maintenance and shopping of the cars. Pullman porters, conductors, and some clerks were adversely affected by partial takeovers, as distinguished from complete takeovers which would adversely affect not only those classes of employees but also shopcraft workers and supervisors (A. 126).

After service of Pennsylvania's notice of partial withdrawal, the conductors sued Pennsylvania and Pullman. In October, 1962 the District Court for the Northern District of Illinois enjoined the withdrawal until such time as the ICC would find that its approval of the USC and the pooling arrangement would not be violated by the proposed withdrawal (*Brogan* v. *Pennsylvania R. R. Co. et al.*, 211 F. Supp. 881, N. D. Ill. 1962). The Commission found in January, 1964 that Pennsylvania's proposed action was contemplated by the USC and not violative of its order approving the "pooling agreement" (322 I. C. C. 100), and a three-judge court affirmed the ICC's finding (263 F. Supp. 650, N. D. Ill. 1966). That judgment was affirmed by the Supreme Court on June 12, 1967 (388 U. S. 455), leaving Pennsylvania, after 5 years of litigation, free to withdraw. The Pennsylvania withdrawal was accomplished on August 1, 1967; however, for five years, a moratorium had been effected upon railroad withdrawals from the Uniform Service Contract (A. 127).

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* "Local line" service was sleeping car service conducted on the lines of one railroad; "joint line" service was the operation of a line of sleeping cars over the tracks of two or more railroads (Plaintiff's App. 25-26).

During the period that the right of the Pennsylvania to withdraw was being litigated, the porters, the conductors, and the shopcraft unions entered into agreements with the contract railroads for job protection in the event of railroad withdrawals from the USC (A. 124-129).

Effects of Pennsylvania's Withdrawal Activities.

During the five-year period in which Pennsylvania's much-litigated notice of withdrawal pended, the operating revenues of Pullman dropped 50%, the number of cars operated declined 40%, and the number of its employees was reduced by about 35% (PX 96).

In June, 1967, after the Supreme Court affirmed the right of Pennsylvania to withdraw, executive employment contracts were immediately made between Pullman and all of its executives. Those contracts required Pullman to maintain the executive's existent salary and, in the event of termination of employment prior to normal retirement, to pay monthly the difference between what the executive would have received if he had retired at normal retirement date and the amount actually received under the pension plan at the date of termination (A. 60). As evidenced by the employment contracts, management was then fearful that Pullman would not continue to exist because of the Pennsylvania withdrawal and the threat of similar action by other railroads (A. 456). So were the unions, for in late August, 1967, after the Pennsylvania withdrawal had been effected, the porters' and clerks' job protection demands, which had been dormant for two years, suddenly were renewed. After the National Mediation Board almost immediately terminated its participation in these cases, the clerks and porters were in a position to strike (A. 183-184). However, when Pullman agreed to consider separation payment agreements for the clerks and porters and in fact entered into a tentative agreement with the clerks union, the threatened strikes were averted (A. 184-186).

Pullman appended to the clerks' agreement the following stipulation:

> "It is understood and agreed that the attached [separation pay] agreement shall be executed by The Pullman Company and your organization as soon as The Pullman Company *receives authorization for the billing of these separation allowances* from the railroads involved in sleeping car operations under the Uniform Service Contract." Emphasis supplied. (PX 131, 190, p. 5, A. 185-186).

In considering these proposed agreements, Pullman's President, George W. Bohannon, and its Director of Labor Relations, Fred J. Boeckelman, concluded that in order for Pullman to recoup from the railroads any amounts paid to employees under them, the approval of the railroads would be necessary (A. 453-455). Bohannon and Boeckelman considered submitting an amendment to the Uniform Service Contract to the railroads, but that course was rejected because they thought such an amendment could not be obtained (A. 453-454, 460). Rather than amending the USC, management determined to first submit the agreements to the Pullman Advisory Committee and its Accounting Subcommittee* and then to the contract railroads for approval from a majority of them (A. 458). This course or procedure which was followed by Pullman was not authorized by the USC or by the order of the ICC approving the USC. As reported by Pullman, it was the "consensus" of the Advisory Committee that management should proceed to submit to the railroads the proposed separation agreement and the manner of recovery of any costs to be incurred (A. 295-296, DX 124).

In March through May, 1968, Pullman communicated with the railroads concerning these agreements. After a majority of the railroads approved execution, Pullman signed the agreements

* The Pullman Advisory Committee was made up of officials of some of the railroads. It was purely advisory, and it was without authority to bind the railroads or to amend the USC. Great Northern and Northern Pacific were not represented on the Advisory Committee or any of its subcommittees (A. 136, 461).

on May 27, 1968 (A. 188-190). Each provided that employees in active service on November 13, 1967 would, if separated after that date, be entitled to a separation payment which could amount to the equivalent of 16 months pay (Stip. Ex. AA, BB).

In April, 1968 Penn Central, formed by merger in February, notified Pullman it would complete the withdrawal on its local lines by the takeover of maintenance and shopping (PX 12-14). At the same time, Penn Central was cajoling the roads with which it had joint line service to withdraw completely from the USC, which action would necessitate a comparable withdrawal by virtually all of the eastern and southern railroads (A. 266-270, PX 17, DX 218, DX 284-289). These railroads accounted for 49% of Pullman operations in the first six months of 1968 (PX 120, pp. 10-11).

In the first 6 months of 1968, Pullman had separated approximately 15% of its employees (DX 49). Further, Pullman had closed its New York laundry and its St. Louis repair shop, thus reducing its plant to one laundry and one repair shop (PX 14).

As a result of the execution of the agreements with the clerks and porters and Penn-Central's withdrawal activities, the remaining Pullman unions made requests for separation payment agreements in the summer of 1968 (A. 190-191). Pullman again took the position that it had no authority under the USC to bill such costs to the railroads. It stated to the National Mediation Board:

> "The reason for our position is clearly outlined in the . . . [porters' and clerks' cases], in which disputes it was necessary for the unions to set strike dates in order to get the issue to the attention of our railroad operators, who had to approve the assumption of the separation allowance and displacement allowance expense provided for in those agreements." (PX 136).

While the eastern and southern railroads were considering withdrawals from the USC in early 1968, Great Northern,

Northern Pacific and CB&Q (sometimes "Northern Lines") and Santa Fe—all major users of Pullman service*—were discussing withdrawal from the USC among themselves and with Pullman. Pullman's president advised the Northern Lines that withdrawal by a major railroad user could result in a "snowball" effect which would trigger withdrawals by all other railroads (PX 17, DX 218).

Bohannon's fear of a "snowball" effect was well-founded, for on August 20, Pullman was advised by Seaboard Coastline that Penn Central had insisted upon partial takeover effective November 1 and that Seaboard had no choice but to also effect such a takeover (DX 66A). As a consequence, almost all of the eastern and southern railroads served notices of partial withdrawal effective November 1 (PX 20A-E, DX 53, DX 303).

As such notices of withdrawal were being received, Pullman advised the railroads that the conductors' union had "processed its proposal" under the Railway Labor Act and had said it would strike on September 14, but that the conductors would accept the same type of separation pay agreement that had been executed with the porters. The railroads were asked to approve the execution of the agreement (PX 18, 19). On September 11, 1968, Pullman determined that a majority of the railroads had approved execution of the conductors' agreement, and it was signed on September 11 (A. 193).

The Proposal for an Orderly Withdrawal of the Railroads from Pullman and the USC.

After the spring of 1968, Mr. W. T. Rice, President of Seaboard, knew that the demise of Pullman was inevitable (A. 264). When the notices of partial withdrawal of the eastern and southern railroads had been effected, he concluded that the question was not whether to liquidate Pullman, but when and

* In the first six months of 1968, Santa Fe accounted for 11.4% and the Northern Lines 14.7% of Pullman operations (PX 120, pp. 10-11).

how to do so. On that account, he and Stuart Saunders, Chairman of the Penn Central, determined to work out a program for orderly withdrawals from the USC and the liquidation of Pullman (A. 270-271, DX 306). On September 6, 1968, Saunders wrote Rice, saying:

> "Following our recent conversation, the Burlington, Great Northern and Northern Pacific advised us of their plan of partial withdrawal in November and complete withdrawal effective March 1, 1969. We have heard informally that other sleeping car lines are studying the situation.
>
> "This confirms your view that the affected lines should begin thinking of an orderly termination of operations. Because of the increased costs and other disadvantages of being the last users of this service, our passenger people expect an onslaught of such notices in the next several months." (DX 305).

Rice and Saunders arranged to schedule a meeting of the railroads for September 27 so as to plan for the termination and liquidation of Pullman (PX 24, DX 305, 306). President Bohannon of Pullman attended the meeting, which was held in Washington, D. C. (A. 266-267, PX 25). He urged the eastern and southern railroads to retract their notices or, in the alternative, to change the effective date of them from November 1 to January 1, 1969 (A. 271). The roads refused to retract their notices, but it was agreed to reset the date of the withdrawal to January 1, 1969, and Bohannon was so advised (A. 271-272, DX 307-308). The remaining railroads in the east and south were directed by Bohannon to serve like notices of withdrawal from the USC (PX 26).

Afterwards on October 8, Bohannon thought that a further series of withdrawals from the USC was inevitable. He suggested to the president of the Chicago Burlington & Quincy that all railroads should partially withdraw on January 1, 1969, in order to avoid the complications that would result from a further series of partial withdrawals (DX 248). In rapid succession like notices of partial withdrawal were received from the western railroads

(DX 53). It was then apparent that it would no longer be possible for Pullman to continue to operate sleeping cars. Thus, Pullman on October 28 wrote each of the remaining contract railroads requesting that notices of partial withdrawal be given effective January 1, 1969 (PX 29).

Complete Withdrawal by the Western Railroads.

In early November, while Pullman prepared for the takeover of the operation of railroad sleeping cars on January 1 (a loss of at least 42% of its business), Pullman's president thought and stated that this takeover was but a first step to a probable subsequent takeover of all remaining services (PX 31B). Bohannon's prediction had a real basis in fact; for, in early November, Southern Pacific, Union Pacific, and Milwaukee, which together accounted for approximately 15% of Pullman operations, were considering complete withdrawal from the USC (DX 81). Pullman made a presentation to these railroads on November 8, and Bohannon then stated that "take-over of all [remaining] service [maintenance and shopping] by several railroads would be the signal for a similar action by all other [railroads]", which circumstance was described as "a snowball" (DX 80). On December 10, Union Pacific and Southern Pacific notified Bohannon that they would take over the maintenance and shopping of the cars (a complete withdrawal) on July 1, 1969. In late December, formal notices of complete withdrawal were received from Santa Fe, Union Pacific, Southern Pacific, and Milwaukee (PX 35, 36, 37, and 38). Consequently, before year-end 1968, Pullman knew that western railroads accounting for 25% of operations would take over the services still remaining under the USC. These notices were of extreme significance not only to Pullman but to the other contract railroads. As a result Rice, President of Seaboard, again arranged for Bohannon to meet with the chief executives of the railroads in Boca Raton, Florida on January

31, 1969, in order to "have another discussion similar to the one held in Washington last fall" (PX 41).*

While the Boca Raton meeting was being arranged, Pullman met with the shopcraft unions and advised them that the railroads had not approved execution of a separation payment agreement for them, that there was particular objection to the effective date of October 17, but that Pullman would consider an effective date of January 1 (Tr. 1290-1291, A. 199, DX 343). The unions considered the situation, and there was immediate agreement to Pullman's proposal. The agreement was executed on January 16, 1969 (A. 199-200).

The Meeting at Boca Raton, Florida.

On January 31, and February 1, Pullman's president Bohannon attended the meeting at Boca Raton. Some railroads said they would take over on July 1, and others said they were taking over on October 1 or November 1. After the president of the Southern Pacific said, "we had better get this over with", all railroads agreed to terminate all remaining Pullman operations effective August 1, 1969 (A. 212-215).

After February 1, 1969, no sleeping cars were accepted for overhaul at the Calumet shop, the entire work force there was laid off, and then the shop was closed. Maintenance activities in terminals around the country ceased on August 1, 1969 (Tr. 3079-3082).

Payment of Separation Allowances.

Pullman paid 2,125 employees separation allowances which totaled approximately $15.6 million. The bulk of these payments were made in the period from August, 1968, through September, 1969.

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* The stated purpose of the meeting in Washington, D. C. that fall was to plan for the termination and liquidation of Pullman, *supra*, pp. 12-13.

REASON FOR GRANTING THE WRIT.

THE DECISION OF THE COURT OF APPEALS VIOLATES THE MANDATE OF RULE 52(A) OF THE FEDERAL RULES OF CIVIL PROCEDURE THAT FINDINGS OF FACT SHALL NOT BE SET ASIDE UNLESS CLEARLY ERRONEOUS AND DECISIONS OF THIS COURT ENFORCING THAT RULE.

In the decision reversing without remandment the judgment of the District Court, where jurisdiction was based on diversity of citizenship, the Court of Appeals found that separation payments made by Pullman to employees terminated by reason of the cessation of its business operations—Pullman's non-operations—were "operating expenses". That was the crucial term used in the Uniform Service Contract which had been executed by Pullman with virtually all of the railroads that furnished sleeping car service. Chief Judge Fairchild dissented. He found, consistent with the comprehensive opinion of the District Judge, that such separation payments were not "operating expenses" as that term was used in the contract but costs of liquidation which should rightly be borne by the shareowners of Pullman. He, as did the District Judge, made the distinction, established by expert accounting evidence and Pullman's own accounting practices, between the expenses of a "going concern" and the costs of a business in liquidation. The majority failed to make that distinction or even to recognize that in accounting such a distinction exists.

The reversal of the judgment by the Court of Appeals is of exceptional importance, for it will govern not only the parties to this action but the respective obligations as between Pullman and numerous other railroads (A. 74). $15 million is at stake. For, if the decision of reversal stands, Pullman's last handful of significant operators of sleeping cars will be required to bear the

$15 million which Pullman in its last year paid to long-term employees because of the termination of its operations. As a consequence of the decision of reversal, the risk and cost of going out of business will be shifted from the capital interests or owners of Pullman to the last customers—a plain injustice.

The majority opinion of the Court of Appeals reaches a result that overturns the findings of the District Judge which were based upon substantial expert testimony. Those findings were not shown to be erroneous let alone clearly erroneous. Further, the findings that the Court of Appeals substitutes for those of the District Judge are without any support in the record.

After hearing evidence comprising more than 3,200 pages of transcript, much of it expert accounting evidence, and considering more than 600 exhibits, the District Court said:

> "The term "operating expenses" is not defined in the Uniform Service Contract ("USC"). Even assuming *arguendo* that the parties intended to have the railroads guarantee against operating losses by Pullman (Stip. Ex. F, 268 I.C.C. 473, 479), this does not eliminate the necessity of defining operating expenses or losses. In the absence of either a definition in the contract or an established legal definition of the term "operating expenses," since it is a term of art within the accounting profession and it appears that the parties intended to use it in that sense, parol evidence of usage within the profession is appropriate when the term is capable of a definite interpretation. *Phillips Petroleum Co.* v. *Payne Oil Corp.*, 146 F. 2d 546, 547 (10th Cir. 1944); *Schrieffer's Motor Serv. Inc.* v. *United Freight Forwarders, Inc.*, 210 F. Supp. 287, 291 (D. Minn. 1962).
>
> "Among accountants, there appears to be a generally accepted definition of operating expenses. The term includes those expenses incurred in the conduct of the major activities of a business which are generally recurrent in nature and somewhat normal and dependable in their operation. A non-operating expense is one which is not incurred directly in the conduct of the normal or major operations of the business, does not recur at regular intervals, and is more or less fortuitous in its occurrence.

"This Court rejects Pullman's contention that separation payments are operating expenses simply because signing the separation pay agreements was necessary to avert strikes and a need existed for the employees at the time of signing. It is the circumstances existing at the time payments were actually made that determines their treatment under the USC.[3] [Footnote 3 provides: This is supported by Pullman's treatment of insurance premiums paid on policies that were part of an employees' group insurance program and a pension plan. See finding 62, *supra.*]

"There are circumstances under which separation payments are properly considered operating expenses. In deciding whether or not separation payments are operating expenses, the cause of the separations and the materiality of the payments are relevant.

"While accountants are in general conceptual agreement about the term "operating expenses," there is considerable subjectivity involved in the decision as to when the separation payments here ceased being operating expenses chargeable to the railroad-users and became instead chargeable to surplus. In short, custom and usage within the accounting profession is not uniform and does not provide definite standards; accordingly, expert opinion carries less weight in construing the parties' intent than might otherwise be the case.

"The Court is of the opinion that for purposes of deciding the issue, the operations of Pullman should be divided into two parts: (1) the full service that included (a) provision of conductors, porters and other personnel and services required for operation of the cars and (b) supplying and maintaining the cars, and (2) the limited service that only involved supplying and maintaining the cars. This division corresponds to the contractual provisions for partial and complete withdrawal. When a railroad partially withdrew it continued as a Pullman customer for service number 2.

"Both aspects of Pullman's operations accounted for a significant portion of its income. The separation pay agreements can be readily identified with either one or the other parts of Pullman's business. There also came a point in time when it became clear that Pullman would cease providing the respective services. After that time the separation pay-

ments for employees in that segment of Pullman's business were material in amount. This Court is of the opinion that once it became clear that Pullman was going to discontinue a segment of its business, separation payments to employees in that segment of its operations were no longer operating expenses chargeable to the contract railroads.

"For porters, conductors and others associated with operations of the cars, (1)(a) *supra*, the cut-off date for charging the expenses to the railroads would be October 28, 1968. See finding 22, *supra*. The cut-off date for employees not in the above category would be January 31, 1969. See findings 27, 28, *supra*." (Cert App. A46-A48).

The Court of Appeals does not disturb the finding that the parties to the USC used the term "operating expenses" therein in an accounting sense; indeed it endorses that finding, for in support of its judgment that the separation payments were operating expenses it relies upon an accounting text or handbook (Cert. App. A13-A14). Indeed, Pullman has conceded just that, for it said to the District Judge:

> "There is little doubt that the term "operating expenses" in the Uniform Service Contract has its origins in railroad accounting." (Reply Brief, p. 36).

What the Court of Appeals does disturb, without any showing of clear error by the District Judge, are the findings as to the accounting meaning of the term "operating expenses" and the application of that meaning to the circumstances of this case.

The accounting meaning of "operating expenses" and its application to the circumstances of this case was not the subject of documentary evidence; instead, it was the subject of the testimony of expert witnesses—Mr. Kujawa for Pullman and Messrs. Grogan, Paolo, and Murphy for Great Northern and Northern Pacific.* On those issues, having observed the respective witnesses, the District Court relied upon the testimony of the experts

* Kujawa was a partner in Arthur Anderson Co., Grogan, a partner of Ernst & Ernst; Murphy, a former partner of Price, Waterhouse; and Paolo was the former chief accounting officer to the Interstate Commerce Commission.

propounded by the petitioners. Their testimony established that in accounting an "operating expense" is one incurred in the *conduct* of the operations of a company, which is generally recurrent in nature and normal and dependable in incidence from year to year. Their testimony further established that separation payments made to employees by reason of the cessation of all or a significant part of operation are not "operating expenses" but appropriate charges against the surplus accounts or accounts other than the operating accounts (Grogan, A. 316-320, 324-326, 330-333, 337-338, 350-355; Paolo, A. 394-395, 396-398, 409-411; Murphy, A. 423-425, 428). Not only was that expert testimony substantial, it became virtually overwhelming because its correctness was confirmed by Pullman's own accounting practices. For in accounting for loss and expense incurred from the cessation of its operations, Pullman generally charged all such loss and expense against surplus and not as "operating expenses". In winding up, Pullman charged against surplus:

(a) The loss on wheel units and batteries used in the continued operation of sleeping cars.

(b) The loss on the sale of linen.

(c) The loss on its material, equipment and machinery in the railroad terminal yards.

(d) The loss on material on hand at the Calumet shop (DX 38-42, A. 290, 274-275).

Pullman's comptroller testified at trial that such charges against surplus were proper (A. 290). Likewise, at the end of its business operations Pullman was confronted with another situation quite analogous to separation pay, in that it involved employee-generated costs, when it paid premiums for group insurance for its employees. Although these employees had devoted their years of service at Pullman to operations under the Uniform Service Contract, Pullman did not consider these amounts in the main as operating expenses and did not charge operations;

instead, quite properly, as its president testified, the amounts were charged against surplus (A. 290-291, 276-277, 466).

Further, in September 1968, Pullman's president held the judgment that any expense arising from Pullman's several executive employment contracts (which were executed in June, 1967 in order to retain executives for operations) should be charged against surplus. In discussing the accounting of Pullman because of the cessation of its operations, its president said:

> "The liquidation of assets, including obsolete materials, disposition of facilities, and closing down of operations would generally be charged to surplus, as also would be liabilities due to closing down Mexican operations, liabilities arising from executive employment contracts, and liabilities under group insurance and pension plans." (PX 25, Tr. 316).

The decision of the Court of Appeals overturning what the trial found to be the accounting meaning of "operating expenses" and the application of that meaning to the evidence of the cessation of Pullman's operations is in plain violation of Rule 52(a) of the Federal Rules of Civil Procedure, which governs appellate review of actions tried without a jury. In pertinent part, that rule provides:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." Rule 52(a) F. R. Civ. P.

In *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100 (1969), this Court, after a grant of the writ, applied the mandate of that rule in reversing a judgment of the Court of Appeals which had reversed a judgment of the District Court awarding damages for the exclusion of an anti-trust counter-plaintiff from a market. Mr. Justice White said:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function

> is not to decide factual issues *de novo*. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position o appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether 'on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed.' *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395 (1948). See also *United States* v. *National Assn. of Real Estate Boards*, 339 U. S. 485, 495-496 (1950); *Commissioner* v. *Duberstein*, 363 U. S. 278, 289-291 (1960)." p. 123.

Such an application of Rule 52(a) is particularly appropriate where the findings of the trial court deal with matters of a technical nature which are governed by "principles not usually contained in the general storehouse of knowledge and experience." *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 339 U. S. 605, 609-610 (1950). That is precisely the case here, for the meaning of "operating expenses" and the application of that meaning to circumstances surrounding a cessation of operations is a matter of accounting.

Rather than dealing directly with the fact that it is overturning findings of fact based on substantial evidence, the majority opinion of the Court of Appeals appears to attribute its action to what it considers a more detailed consideration of the underlying documents and to the "many cases which shed light on the probable intention of the parties to the Uniform Service Contract when they used the terms 'operating expenses,' 'actual expenses,' and direct expenses'." (Cert. App. A12-A14).

Instead of focusing on the accounting meaning of "operating expenses" and the application of that meaning to the facts of this case, the majority attributes significance to the terms "actual expenses", "direct expenses" and "indirect expenses", which are also found in the USC, *supra*, p. 6, in order to determine that the separation pay here was an "operating expense". This

is a case of "tail wagging dog", for it is clear from the USC which, in pertinent part, is set forth in the District Court's Opinion (Cert. App. A23-A24)* that such terms were used in the sense of actual operating expenses, direct operating expenses, and indirect operating expenses. To ignore that the terms "direct expenses" and "actual expenses" are sub-categories of "operating expenses" and to then equate the meaning of those terms to the meaning of the term "operating expenses" is fallacious, for what is "direct" or "actual" is not necessarily an operating expense. The truth is that the termination payments here in issue were both "direct" and "actual"—but they were not "operating expenses"; instead, they were costs of liquidation occasioned by the cessation of operations.

The infirmity in the reasoning of the majority is not cured by the citation of five cases, which the majority describes as "allied" to the issue (Cert. App. A16), when in fact these cases are inapposite. This Court in *Social Security Board* v. *Nierotko*, 327 U. S. 358 (1946), made no pronouncement concerning dismissal pay; it only quoted in a footnote from a regulation of the Treasury Department which required that dismissal pay be taxed as "wages" under the Social Security Act. *Carragan* v. *Commissioner*, 197 F. 2d 246 (2nd Cir. 1952) and *Hooker* v. *Hoey*, 27 F. Supp. 489 (S. D. N. Y. 1939) are cited for the proposition that a "severance allowance" and a "retirement allowance" are taxable income and not gifts to the recipients thereof. With the propositions that those cases stand for, we do not disagree. Nor do we dispute that, as held in *Inland Steel Co.* v. *NLRB*, 170 F. 2d 247 (7th Cir., 1948), retirement and pension plans are bargainable issues within the National Labor Relations Act's language of "pay, wages, hours of employment or other conditions of employment". All of this has been axiomatic for years, as has the proposition stated in *Alabama Power Co.* v. *FPC*, 134 F. 2d 602 (5th Cir. 1943) that bonuses are wages. These

* The Uniform Service contract and the Appendix thereto are completely reproduced in Pullman's Appendix in the Court of Appeals at pages 23 through 107.

cases are not in point, and they do not establish or purport to establish the meaning of the term "operating expenses" or that the separations payments in question here were operating expenses or non-operating expenses.

The Court of Appeals states its justification for overturning the trial court's findings at the conclusion of its opinion where it is said:

> In allied contexts, separation pay has uniformly been considered to be a part of wages and part of direct labor costs. We can only conclude that the separation payments herein involved were intended by the parties to the Uniform Service Contract to be part of "all of Pullman's expenses of conducting its sleeping car business and commissary services" and to be an "operating expense" or "actual expense" or "direct expense" of such business. (Cert. App. A16).

Notwithstanding the fact that the quoted phrase "all of Pullman's expenses of conducting its sleeping car business and commissary service" does not appear in the Uniform Service Contract but only in the predecessor uniform operating contract, the conclusion drawn by the majority just does not follow from the premise—merely because a cost is wages, or akin to wages, or a direct labor cost does not make it an operating expense. Would the wages paid to employees guarding Pullman's idle physical plant and inactive fleet of sleeping cars and assisting the auctioneers of that property because of the cessation of operations be "operating expenses"? Plainly not. Not in an accounting sense or in any sense.

Pullman's comptroller testified that a liquidating expense is one caused by going out of business (A. 298). Pullman stipulated at the trial that from and after February 1, 1969, it was in liquidation (A. 208-209). Yet, the bulk of the payments the majority opinion deems to be operating expenses—$10.7 million —were made *after* February 1, 1969 (DX 134).

The Court of Appeals has wholly disregarded the substantial expert accounting evidence upon which the District Court's findings were based. By reason thereof, the Court of Appeals has wholly failed to discharge the appellate review required by Rule 52(a).

PRAYER FOR WRIT OF CERTIORARI.

WHEREFORE, Petitioners pray this Court's writ of certiorari issue to review and reverse the judgment of the Court of Appeals for the Seventh Circuit in this case.

Respectfully submitted,

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Dated: June 30, 1975.

APPENDIX

APPENDIX.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

Nos. 74-1493, 74-1494

THE PULLMAN COMPANY,
Plaintiff-Appellant,

vs.

THE GREAT NORTHERN RAILWAY COMPANY and THE NORTHERN PACIFIC RAILWAY COMPANY,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 70 C 267

RICHARD W. MCLAREN, *Judge.*

Argued January 23, 1975—Decided April 17, 1975

Before FAIRCHILD, *Chief Judge,* SWYGERT and SPRECHER, *Circuit Judges.*

SPRECHER, *Circuit Judge.* The question presented by this appeal is whether separation payments made to terminated employees by The Pullman Company by reason of the cessation of its sleeping car operations constitute "operating expenses" to be borne by railroads which had contracted to use sleeping car service.

I.

George M. Pullman organized the Pullman Palace Car Company in 1867, which built Pullman sleeping cars and operated them under contracts with railroads. In 1899 the company became The Pullman Company; in 1924 Pullman Car & Manufacturing Corporation was formed to operate the manufacturing business; in 1927 Pullman Incorporated was created as a holding company, holding all of the stock of Pullman Car & Manufacturing Corporation (which in 1934 became Pullman-Standard Car Manufacturing Company) and all except a small fraction of the stock of The Pullman Company.

In a suit filed by the United States, the District Court for the Eastern District of Pennsylvania, finding that a monopoly existed in violation of Section 2 of the Sherman Act, entered a decree on May 8, 1944 requiring Pullman Incorporated to divest itself of either the manufacturing business conducted by Pullman-Standard or the sleeping car business conducted by The Pullman Company.

Pullman Incorporated elected to divest itself of its interest in the sleeping car business and the properties used in connection therewith. On June 30, 1947, the stock of The Pullman Company was sold to 59 railroads, who purchased the same percentage of Pullman Company stock as their percentage of total Pullman car use during the year 1940.

The Interstate Commerce Commission approved the stock sale to the railroads and also the execution by Pullman of agreements with each of the railroads utilizing its service in the form of a "Uniform Operating Contract," pursuant to which Pullman operated and serviced sleeping cars, received fares paid by Pullman patrons, and pooled and allocated revenues and expenses among the railroads which used Pullman's services. *Proposed Pooling of Railroad Earnings and Service Involved in Operation of the Pullman Company under Railroad Ownership*, 268 I. C. C. 473 (1947).

The Uniform Operating Contract provided that if in any contract year total gross earnings were less than Pullman's "Expenses of Operation," the railroads would pay Pullman the amount of the deficiency. "Expenses of Operation" were defined to include "all of Pullman's expenses of conducting its sleeping car business and commissary services," except income taxes, and except the cost of operating air conditioning equipment which cost would be paid directly by each railroad instead of being pooled.

The Interstate Commerce Commission concluded that these provisions required the contracting railroads to assure the operating expenses of the "joint enterprise" by participating "in a guaranty against operating losses by Pullman." *Id.* at 479.

Effective July 1, 1949, the Uniform Operating Contract was replaced by the "Uniform Service Contract," which provided in Section 7(c) that "[i]f for any Contract Year the expenses allocated to the Railroad plus the 3% return on Pullman's investment allocated to the Railroad, shall exceed the revenues allocated to the Railroad, the Railroad shall pay to Pullman the amount of the deficiency." The Contract specified that "[e]xpenses to be accounted for under this contract shall include the following: (A) Operating Expenses, (B) Taxes other than Federal Taxes on Income, (C) Rental for Cars."

An amendment to the Uniform Service Contract, Appendix A, became effective January 1, 1956 and provided in part that "[a]ctual expenses shall be segregated into the following [ten] general cost groups," including such items as "Car Repairs," "Conductors" and "Porters." Appendix A also provided that:

> Each of the above groups shall include direct and indirect expenses pertaining thereto, as well as appropriate proportions of district and general administrative expenses and taxes, other than Federal taxes on income, as provided for in Pullman's "Classification of Accounts," as prescribed by the Interstate Commerce Commission.

This Classification of Accounts is also known as Pullman's System of Accounts, establishing several categories of accounts, including property accounts, revenue accounts, expense accounts, income accounts, earned surplus accounts and balance sheet accounts. Each category contains accounts in which specific items are to be included. The System of Accounts also established various clearing accounts.

The separation payments involved in this appeal were charged by Pullman to a clearing account, 6-22, General Administration, which included "[p]ensions and relief expenses not otherwise provided for; . . . and other expenses."

During the years following World War II, travel in the United States increasingly moved by automobile and airplane at the expense of the railroads. Under the Uniform Service Contract, a railroad had the right to withdraw wholly or partially from the Contract and to assume the functions theretofore served by Pullman.

A complete withdrawal, for which six months' written notice to Pullman was necessary, required the particular railroad to furnish and operate its own sleeping cars and maintain them in shops of its own choosing. A partial withdrawal, for which a 60 days' written notice to Pullman was customarily given, required the particular railroad to operate sleeping cars with its own conductors and porters, while continuing to obtain cars from and having them maintained and shopped by Pullman.

On July 1, 1958, the New York Central Railroad withdrew completely from Pullman service on most of its lines. In 1967 and 1968, several roads withdrew partially, and these and most of the other roads were in the process of considering complete withdrawal.

The chief executives of the Pullman contract railroads met in Boca Raton, Florida, on January 31, 1969, to consider a uniform withdrawal date. The two principal executives of Pullman attended the meeting. At the meeting all the contract railroads,

including the two defendant railroads, The Great Northern and The Northern Pacific, and the Burlington which they jointly owned, indicated their decision to withdraw completely effective August 1, 1969. At that time it became certain that the rendition by The Pullman Company of a sleeping car service would come to an end and that Pullman would go out of business. Shortly after the Boca Raton meeting, all of the remaining contract railroads gave notice of complete withdrawal effective as of August 1, 1969.

Throughout the period of declining railroad and Pullman business, the railroad unions began to negotiate for job termination agreements with the railroads.

On May 21, 1936, most of the railroads had executed the so-called Washington Job Protection Agreement with the Order of Railway Conductors whereby conductors who lost their jobs as the result of a consolidation, merger or pooling of facilities would receive 60 percent of their compensation for a period up to five years, or, in the alternative, a lump-sum separation allowance. On December 9, 1963, the conductors entered into the Wolfe-Wise Agreement, subsequently ratified by 31 railroads including The Great Northern and The Northern Pacific, whereby a conductor who lost his job as the result of the withdrawal of a Pullman contract railroad had the option of receiving 60 percent of his compensation for up to 24 months or the lump-sum separation allowance provided in the Washington Job Protection Agreement.

The Brotherhood of Sleeping Car Porters entered into the Wolfe-Randolph Agreement on December 17, 1963, subsequently ratified by 33 railroads, including The Great Northern and The Northern Pacific, whereby porters offered employment by a withdrawing Pullman contract railroad would retain the same employment rights they had at Pullman but receive no separation pay in the event of the loss of their jobs.

The six shopcraft unions obtained an agreement from the railroads on September 25, 1964, extending the Washington

Job Protection Agreement to discontinuances of services. The Brotherhood of Railway and Steamship Clerks obtained an agreement from the railroads on February 7, 1965, extending certain separation rights to clerks.

The railroad unions then began to negotiate for job termination agreements with The Pullman Company. The porters and clerks made the first demands on Pullman.

On March 13, 1968, Pullman sent a letter to the chief executives of the Pullman contract railroads, advising that it would enter into separation pay agreements with the porters and clerks if railroads which together incurred more than 50 percent of Pullman's 1967 expenses of operations approved its doing so. It indicated that any expenses incurred pursuant to the agreements, if executed, would be charged to the contract railroads in proportion to their 1967 percentage of Pullman's operations. In response, none of the contract railroads, including The Great Northern or The Northern Pacific, objected to the indicated method of allocating the separation pay expenses. Contract railroads, including The Northern Pacific, which together incurred 91.2464 percent of Pullman's 1967 expenses of operations, approved Pullman's execution of the agreements. The Great Northern did not approve.

Therefore, on May 27, 1968, Pullman entered into substantially identical separation pay agreements with the porters and clerks. The agreements provided that employees in active service with Pullman on November 13, 1967, would receive a lump-sum separation allowance of $2,500 from Pullman if they accepted employment by a railroad and nothing if they refused such employment. Furloughed employees would receive separation pay equal to 360 days' pay, depending on their length of service.

After demands by the conductors, Pullman submitted a draft of a separation pay agreement involving the conductors to the contract railroads for approval. Railroads, including The Northern Pacific, which together incurred 65 percent of Pullman's

1968 expenses of operations, approved Pullman's execution of the agreement. The Great Northern disapproved. Thus, Pullman on September 11, 1968, executed a separation pay agreement with the conductors which was patterned after the porters' and clerks' agreements. In submitting the agreement to the railroads, Pullman stated that expenses incurred pursuant to the agreement would be charged to the contract railroads in proportion to their 1968 percentages of Pullman's expenses of operations. None of the responses to Pullman, including those of The Great Northern and The Northern Pacific, expressed any objection to the charging of expenses to the contract railroads.

Pullman had entered a partial separation pay agreement with the six shopcraft unions on July 19, 1966. Following the porters' and clerks' agreements, the shopcrafts demanded equal separation pay benefits. On January 16, 1969, Pullman entered into an agreement with the shopcraft unions, which was similar to the porters' and clerks' agreements except that it did not provide for the transfer allowance of $2,500. Railroads accounting for 74.5535 percent of the Pullman operating expenses for the first six months of 1968 approved of the modified agreement with the shopcrafts.

On January 29, 1969, Pullman executed a separation pay agreement with its supervisors through the American Railway Supervisors Association. This agreement was similar to that executed with the shopcrafts and had been part of the solicitation of and approval by a majority of the contract railroads of the shopcraft agreement.

In June 1967, Pullman had entered into employment contracts with 21 of its executives and key employees, which required Pullman to maintain various benefits. On November 4, 1968, the board of directors of Pullman approved a resolution that its non-union employees be paid the pattern separation allowance. Pullman did not enter into a separation pay agreement with United Transport Service Employees, representing its laundry workers.

In regard to the separation pay negotiations and agreements, the district court made the following significant finding of fact:

> Pullman's negotiations with respect to each separation pay agreement it entered into were at arm's length. On each occasion on which Pullman committed itself to making separation payments, there was no decision to cease the operations involved and Pullman acted with the reasonable expectation that in its operations there would be a need to employ the group of employees to whom it agreed to pay the separation allowances, although the duration of that need was not clear.

During the period June 1968 to October 1971, Pullman made separation payments to its employees totalling $15,647,461.05 in accordance with the various agreements and the board resolution of November 4, 1968. It billed the separation pay expenses to the Pullman contract railroads as operating expenses in proportion to their respective shares of Pullman's operating expenses in the years in which the seperation pay liabilities were incurred.

The amount billed by Pullman to The Great Northern for separation pay and not paid was $537,630.22. The amount billed to The Northern Pacific and not paid was $458,282.17.

Pullman brought suit against The Great Northern and The Northern Pacific to recover the separation pay expenses not paid. Each railroad in turn filed a three-count counterclaim seeking to recover separation pay expenses previously billed by Pullman and paid by each road. The foregoing is a summary of the district court's 62 findings of fact, none of which are disputed by the parties.

II.

The complaint against The Great Northern (Count I) and The Northern Pacific (Count II) as well as Count I of the counterclaim of each of those roads raised essentially the same issues and were disposed of together by the district court, which phrased the issues as follows:

> Pullman's theory is that under the Uniform Service Contract the railroads were obligated to pay all operating expenses and that, since the separation pay agreements were entered into at a time when there was a need for the employees and were necessary to avert strikes, the costs associated with those agreements are reimbursable operating expenses.
>
> . . . Great Northern and Northern Pacific have taken the position they are under no obilgation to reimburse Pullman for separation payments that were made once it was determined not to operate or to cease Pullman sleeping car operations in the United States or to litigate, dissolve or cause the cessation of such operations.

As noted in part I *supra*, the district court found that the final separation pay agreements were entered into witn the various groups of Pullman employees upon the following dates:

Porters and Clerks	—	May 27, 1968
Conductors	—	September 11, 1968
Non-union	—	November 4, 1968
Shopcrafts	—	January 16, 1969
Supervisors	—	January 29, 1969

The court further found that the decision to cease all operations and to liquidate Pullman was made at the Boca Raton meeting on January 31, 1969, a date subsequent to the conclusion of all separation pay agreements. Consequently, the court found that "at the time each of the separation pay agreements was entered into, there had been no decision to terminate the operations involved and that there was a need to employ the group of employees to which it was agreeing to pay the separation allowances."

The Interstate Commerce Commission in 1947 had approved the operating agreements between Pullman and the contracting railroads, characterizing the agreements as follows:

> The contract would make an important change from the present arrangement, due to the fact that in the future each

> contracting railroad would have to participate in a guaranty against operating losses by Pullman.

268 I. C. C. at 479.

Both The Great Northern and The Northern Pacific were applicants in that proceeding seeking approval of the agreements. *Id.* at 493. The Order of Railway Conductors had intervened and expressed concern over the possible effect of the changes on Pullman employees.

In reassuring the employees, the Commission pointed out that the District Court for the Eastern District of Pennsylvania, in approving the sale of Pullman stock to the railroads on January 4, 1946, had ordered:

> This order is made without prejudice to the rights of the employees of the Pullman Company under existing contracts and practices.

Id. at 494.

The Commission further mollified the Pullman employees by noting:

> In October 1945 the railroad buying group gave the following assurance in writing, which was repeated in their intervening petition in the district court and is reiterated in this record by the applicants:
>
> > The Pullman Company under its railroad ownership will faithfully perform and keep the obligation and commitments to labor under the outstanding agreements and practices according to the law of the land. . . .

Id. at 491.

At that time the railroads had already executed the 1936 Washington Job Protection Agreement with the conductors, providing for separation allowances. Thus, there was nothing extraordinary in The Pullman Company's negotiating and eventually executing the separation pay agreements of 1968 and 1969. Furthermore, Pullman obtained the express approval of the railroads which incurred more than 50 percent of its

expenses of operations prior to executing each of the separation pay agreements.

The district judge found that the term "operating expenses" is not defined in the Uniform Service Contract. He then held that in the absence of either a definition in the contract or an established legal definition and that "since it is a term of art within the accounting profession and it appears that the parties intended to use it in that sense, parol evidence of usage within the profession is appropriate when the term is capable of a definite interpretation."

Having heard some expert testimony,* however, the district judge observed:

> While accountants are in general conceptual agreement about the term "operating expenses," there is considerable subjectivity involved in the decision as to when the separation payments here ceased being operating expenses chargeable to surplus. In short, custom and usage within the accounting profession is not uniform and does not provide definite standards; accordingly, expert opinion carries less weight in construing the parties' intent than might otherwise be the case.

The district judge then concluded:

> This Court is of the opinion that once it became clear that Pullman was going to discontinue a segment of its business, separation payments to employees in that segment of its operations were no longer operating expenses chargeable to the contract railroads.

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* The district court drew the following conclusion:

> Among accountants, there appears to be a generally accepted definition of operating expenses. The term includes those expenses incurred in the conduct of the major activities of a business which are generally recurrent in nature and somewhat normal and dependable in their operation. A non-operating expense is one which is not incurred directly in the conduct of the normal or major operations of the business, does not recur at regular intervals, and is more or less fortuitous in its occurrence.

> For porters, conductors and others associated with operations of the cars, . . . the cut-off date for charging the expenses to the railroads would be October 28, 1968. . . . The cut-off date for employees not in the above category would be January 31, 1969.

The reference to October 28, 1968 pertains to the court's finding that "[b]y October 28, 1968 railroads using a substantial majority of Pullman's sleeping car services had either served or intended to serve notices of partial withdrawal effective January 1, 1969."

Accordingly, the court entered judgment in favor of Pullman for those separation payments made to the respective groups of employees before the cut-off dates and in favor of Great Northern and Northern Pacific for any payments made to Pullman in respect to separation payments after the cut-off dates. As a result judgment was entered in favor of Great Northern for $183,513.16 plus costs and in favor of Northern Pacific for $158,844.49 plus costs.

III.

We affirm and adopt the district court's findings of fact numbered 1 through 62. We part with the court in some of the conclusions it reaches in applying those facts.

In the first place, the court disposed of the basic documents we are interpreting in too summary a fashion.

Article IV, Secton 1(c) of the original Uniform Operating Contract, which had been approved by the Interstate Commerce Commission, provided that:

> If, for any contract year, the total gross earnings of all sleeping cars operated under the terms of this contract shall be less than the total amount of Pullman's "Expenses of Operation" of such cars . . . , the Railroad shall pay to Pullman the amount of the deficiency.

Article IV, Section 3 provided in part:

> Except as herein otherwise provided, the term "Expenses of Operation" as used in this contract shall include

> all of Pullman's expenses of conducting its sleeping car business . . . and also including but not limited to the various items elsewhere herein expressly provided to be included in "Expenses of Operation"; . . . .

Article V, Section 1 provided in part that "[t]his contract shall be construed liberally so as to secure to each party all the rights, privileges and benefits herein provided or manifestly intended. . . ."

The later adopted Uniform Service Contract provided in Section 7(c):

> If for any Contract Year the expenses allocated to the Railroad plus the 3% return on Pullman's investment allocated to the Railroad, shall exceed the revenues allocated to the Railroad, the Railroad shall pay to Pullman the amount of the deficiency.

In an appendix the Uniform Service Contract specified that "[e]xpenses to be accounted for under this contract shall include the following: (A) Operating Expenses. . . ." The Contract appendix provided that "[a]ctual expenses shall be segregated into the following [ten] general cost groups" and that "[e]ach of the above groups shall include direct and indirect expenses pertaining thereto, as well as appropriate proportions of district and general administrative expenses. . . ."

In a book dealing with accounting and the law it was said that:

> The cost of direct labor has long been recognized as a basic cost chargeable directly to the particular product or service with which it is associated. For legal and accounting purposes, the cost of direct labor is not limited to wages paid, but embraces within its meaning various direct economic benefits to workers flowing from the employment relationship.
>
> * * *
>
> Direct items have been identified and distinguished from indirect labor and from general and administrative expense, particularly in decisions as to reimbursement under contracts of the cost-reimbursable type. Thus, included in

> cost of direct labor in addition to wages are overtime premium pay, vacation pay, pay for "coffee breaks" and holidays not worked, pay for travel time, standby pay, severance pay, and incentive pay.

G. Hills, "The Law of Accounting and Financial Statements," 194-97 (1957).

The parties have not directed us to any case, nor have we found one, which is directly on point, but there are many cases which shed light on the probable intention of the parties to the Uniform Service Contract when they used the terms "operating expenses," actual expenses," and "direct expenses."

In holding that "back pay" shall be treated as "wages" under the Social Security Act, the Supreme Court pointed out that "dismissal pay" constitutes wages. *Social Security Board* v. *Nierotko,* 327 U. S. 358, 366, n. 17 (1946). Wages, in turn, are direct labor expenses.

The Second Circuit held in *Carragan* v. *Commissioner,* 197 F. 2d 246, 248 (2d Cir. 1952), that a severance allowance upon liquidation of the employing corporation was additional compensation to the employee for past services and not a tax-free gift. Earlier the Second Circuit had held that "retiring allowances" constituted taxable income as one form of compensation for personal service. *Hooker* v. *Hoey,* 27 F. Supp. 489 (S. D. N. Y.), *aff'd,* 107 F. 2d 1016 (2d Cir. 1939).

In *Inland Steel Co.* v. *NLRB,* 170 F. 2d 247 (7th Cir. 1948), we held that an employer must bargain with respect to retirement or pension plans since they fall within the National Labor Relations Act's language of "pay, wages, hours of employment or other conditions of employment." The Supreme Court denied certiorari upon the pension issue in 336 U. S. 960 (1949), and affirmed the balance of the opinion in *American Communications Ass'n* v. *Douds,* 339 U. S. 382 (1950).

In *Alabama Power Co.* v. *FPC,* 134 F. 2d 602 (5th Cir. 1943), in determining reimbursable construction costs under

the Federal Power Act, the Fifth Circuit held that bonuses to employees are "often considered good business as tending to satisfy employees with their wages, and as an incentive to greater effort. . . . [The bonuses] were paid for labor, and not from philanthropy, and ought to be included with the wages they supplemented, as construction costs." *Id.* at 610.

In summary, the railroads, with the approval of the Interstate Commerce Commission, agreed "to participate in a guaranty against operating losses by Pullman." 268 I. C. C. at 479. In the original Uniform Operating Contract, approved by the Commission, the railroads agreed to pay Pullman "all of Pullman's expenses of conducting its sleeping car business and commissary services." In the subsequent Uniform Service Contract, also approved by the Commission, the railroads agreed to pay Pullman's expenses including "operating expenses" and "actual expenses," which include "direct and indirect expenses."

Pullman had been placed on notice by the District Court for the Eastern District of Pennsylvania in 1946 and by the Commission in 1947 to observe the rights of its employees, which by then already included in regard to conductors separation allowances under the 1936 Washington Job Protection Agreement. Beginning as early as 1960, the various unions pressed for expanded separation pay rights. The Great Northern and The Northern Pacific joined with most of the railroads in granting separation pay allowances in 1963 to the conductors and porters, in 1964 to the shopcrafts and in 1965 to the clerks.

After succeeding with the railroads, the unions pressed Pullman to enter into similar separation pay agreements. Pullman executed the various agreements in 1968 and early 1969 only after the threat of strikes by each union (findings 41, 46, 53, 56) and after the approval by a majority of the railroad users of Pullman service as to each contract. The railroads were advised prior to approving that Pullman intended to charge the separation pay expenses to the railroads in accordance with

the Uniform Service Contract and none of them, including The Great Northern or The Northern Pacific, objected.

The district court expressly found that the Pullman negotiations with respect to each separation pay agreement were at arm's length, that each commitment to make separation payments was made prior to the decision to cease operations and that Pullman acted with reasonable expectation that there would be a need to continue to employ each group of employees involved (finding 59).

Pullman charged the separation payments to clearing account 6-22, General Administration, which was part of the System of Accounts approved by the Interstate Commerce Commission on October 4, 1950, and which included "[p]ensions and relief expenses not otherwise provided for . . . and other expenses."

In allied contexts, separation pay has uniformly been considered to be a part of wages and part of direct labor costs. We can only conclude that the separation payments herein involved were intended by the parties to the Uniform Service Contract to be part of "all of Pullman's expenses of conducting its sleeping car business and commissary services" and to be an "operating expense" or "actual expense" or "direct expense" of such business.

Insofar as the district court entered judgment in favor of Great Northern and Northern Pacific against Pullman in respect of separation payments, the judgment is reversed and the cause remanded with directions to enter judgment in favor of Pullman and against Great Northern and Northern Pacific as sought in Counts I and II of the complaint and under Count I of the respective counterclaims. We affirm the judgments in favor of Pullman and against Great Northern and Northern Pacific under Counts II and III of the counterclaims for the reasons expressed by the district court.

REVERSED IN PART; AFFIRMED IN PART.

FAIRCHILD, *Chief Judge*, dissenting in part.

I respectfully dissent, in part.

It seems to me that Judge McLaren's definition of an operating expense as an expense "incurred in the conduct of the major activities of a business which [is] generally recurrent in nature and somewhat normal and dependable in [its] operation" is reasonable. I agree that the cost of separation pay is an operating expense to an on-going business, but here the expense has become a cost of liquidation. Such cost ought to be borne by the company's shareholders in proportion to their ownership interests, not in proportion to their use of the company's assets.

Pullman's treatment of liabilities arising from executive employment contracts and under group insurance and pension plans confirm the soundness of this distinction. Both the executive employment agreements, which in substance provided protection in the event the business terminated, and the employee insurance and pension plans were executed to attract and retain qualified employees to run Pullman's operation. Yet, once it was decided to liquidate the business these liabilities were quite properly charged to surplus. I can see no meaningful distinction between these expenses and the separation allowances the majority now deems to be "operating expenses."

Accordingly, I would affirm the judgment of the district court in all respects.

IN THE UNITED STATES DISTRICT COURT,
For the Northern District of Illinois,
Eastern Division.

THE PULLMAN COMPANY,
Plaintiff,

vs.

THE GREAT NORTHERN RAILWAY COMPANY and the NORTHERN RAILWAY COMPANY,
Defendants.

No. 70 C 267

MEMORANDUM OPINION AND ORDER.

This matter was tried on the merits before the Court and without a jury. At issue is whether or not the defendant railroads are obligated to reimburse The Pullman Company ("Pullman") for separation payments made by Pullman to various employees. Pullman alleges that the separation payments are "operating expenses" chargeable to its users pursuant to the contract between Pullman and its users; the theory being that at the time Pullman signed the agreements obligating it to make the separation payments, there was a continuing need for the employees involved and the agreements were necessary in order to continue operations. The defendants take the position that the separation payments are not "operating expenses" for which they are obligated to reimburse Pullman, but are instead chargeable to Pullman's surplus accounts.

The defendants filed counterclaims. Count I alleges that Pullman wrongfully billed defendants for separation payments and that defendants erroneously paid such charges, but are now entitled to a refund for such amounts as were erroneously paid. Count II alleges that Pullman, its officers and agents owed defendants a duty to terminate employees in connection with the cessation of operations and the liquidation of Pullman without incurring unnecessary or unwarranted severance pay liabilities to Pullman's employees. It is further alleged that, contrary to specific requests from defendants, Pullman did unnecessarily incur such liabilities, with the result that defendants will receive a lesser amount in liquidation of Pullman than would otherwise be available for distribution. Count III alleges that Pullman wrongfully failed to comply with its Interstate Commerce Commission approved System of Accounts in accounting for separation payments to its employees and that by reason thereof the defendants were billed for such expenses in violation of their contract with Pullman. Defendants demand that Pullman refund those amounts that were allegedly wrongfully billed.

When this suit was filed The Southern Railway Company was also named as a defendant, but a settlement was agreed upon between it and Pullman. It appears that the other user-railroads have reimbursed Pullman for the cost of separation payments. However, Pullman has stated that it will apply the result in this case to the other user-railroads. In this regard, it should be noted that each of the user-railroads was also a shareholder.

At one time every Pullman shareholder contracted with Pullman for the provision of sleeping car services, but by the time the separation payment agreements were entered into between Pullman and the unions, some of the shareholders had discontinued the use of such services. The instant dispute thus centers around whether the costs of the separation payments will be paid by the railroads who were continuing to use Pullman services in proportion to their use at a given time or whether the costs will be paid by all shareholders in proportion to their stock ownership.

I.

The following constitute the Court's findings of fact.

JURISDICTION.

1. When this action was filed, The Pullman Company was an Illinois corporation with its principal and only place of business in Chicago, Illinois. The Great Northern Railway Company was a Minnesota corporation, and The Northern Pacific Railway Company, a Wisconsin corporation. Both railroad companies maintained their principal places of business in St. Paul, Minnesota. There is, therefore, diversity of citizenship between the parties.

HISTORY OF THE PULLMAN COMPANY.

2. In 1867, George M. Pullman organized Pullman's Palace Car Company, which became The Pullman Company in 1899. Between 1867 and 1899, the company acquired several other sleeping car companies, and on December 31, 1899 became the only sleeping car company in the United States. Between 1900 and 1935, The Pullman Company acquired substantially all of the sleeping car facilities of every railroad which during that period had owned and operated its own sleeping cars. As of 1939, The Pullman Company furnished and serviced, under contracts with the railroads, virtually all of the sleeping cars operated in the United States.

3. From 1881 until 1924, The Pullman Company manufactured, with a few exceptions, all new sleeping cars used by it in furnishing Pullman sleeping car service to the railroads. In 1924, Pullman Car & Manufacturing Corporation was organized to operate the manufacturing business which had theretofore been conducted by The Pullman Company. In 1927, Pullman Incorporated was created as a holding company, holding all of the stock of Pullman Car & Manufacturing Corporation and all except a small fraction of the stock of The Pullman Company. In 1934, Pullman Car & Manufacturing Corporation changed its name to Pullman-Standard Car Manufacturing Company.

4. On July 12, 1940, the United States filed suit under the Sherman Act in the United States District Court for the Eastern District of Pennsylvania against The Pullman Company, Pullman-Standard Car Manufacturing Company, and Pullman Incorporated. In an opinion rendered April 20, 1943, the District Court, 50 F. Supp. 123, found that a monopoly, in violation of Section 2 of the Sherman Act, had been established.

5. The final decree entered May 8, 1944 required Pullman Incorporated to divest itself of either the sleeping car business conducted by The Pullman Company or the manufacturing business conducted by Pullman-Standard and, as long as it continued in the sleeping car business, to furnish and service its sleeping cars to any railroad on request on a reasonable and nondiscriminatory basis.

PURCHASE OF THE PULLMAN COMPANY BY THE RAILROADS AND THE POOLING ARRANGEMENT UNDER WHICH IT WAS TO BE OPERATED

6. Thereafter, Pullman Incorporated elected to divest itself of its interest in the sleeping car business and properties used in connection therewith. On June 30, 1947, the stock of The Pullman Company was sold to 59 railroads, who purchased the same percentage of Pullman stock as their percentage of total Pullman car use during the year 1940. Apart from the combining of percentages consequent to railroad mergers, those stock percentages have remained the same at all times since.

7. The sale of the stock of The Pullman Company (hereafter "Pullman") to the railroads followed approval by the Interstate Commerce Commission of the sale, 268 I. C. C. 473. The Interstate Commerce Commission also approved the sale by Pullman of all of its sleeping cars regularly assigned to railroads to the railroads to whom they were assigned, the retention by Pullman of the balance of its sleeping cars as a pool available for use by the railroads when needed, and

the lease from the railroads of the cars sold in exchange for rent. It approved the execution by Pullman of agreements with each of the railroads utilizing its services in the form of a 'Uniform Operating Contract,' pursuant to which Pullman operated and serviced sleeping cars, received fares paid by Pullman patrons, and pooled and allocated revenues and expenses among the railroads which used the cars and services of Pullman.

8. The Uniform Operating Contract provided that if in any contract year total gross earnings of all sleeping cars operated under the contract were less than Pullman's "Expenses of Operation," the railroads would pay to Pullman the amount of the deficiency. "Expenses of Operation" were defined to include "all of Pullman's expenses of conducting its sleeping car business and commissary services," except income taxes, and except the cost of maintaining and operating air conditioning apparatus which the contract provided would be paid directly by the railroads rather than pooled. The Interstate Commerce Commission found, with respect to these provisions, that the contracting railroads assured the operating expenses of the "joint enterprise" by participating "in a guaranty against operating losses by Pullman," 268 I. C. C. 473, 479.

9. As a result of complaints by some of the railroads that the method of allocating expenses under the Uniform Operating Contract was unfair to them, and following an engineering study of Pullman's operations, Pullman, effective July 1, 1949, entered into contracts in the form of the Uniform Service Contract with each railroad then utilizing Pullman sleeping car service, including the Great Northern and the Northern Pacific which remained parties to it until August 1, 1969. The Uniform Service Contract had to receive the approval of the ICC. 49 U. S. C. § 5(1). While the Uniform Service Contract changed the method of allocation provided in the Uniform Operating Contract, it left undisturbed the obligation of the contracting railroads to pay to Pullman the amount of any deficiency in

its operating expenses. It provided, Sec. 7(c), that "[i]f for any Contract Year the expenses allocated to the Railroad plus the 3% return on Pullman's investment allocated to the Railroad, shall exceed the revenues allocated to the Railroad, the Railroad shall pay to Pullman the amount of the deficiency." It specified that "[e]xpenses to be accounted for under this contract shall include the following: (A) Operating Expenses, (B) Taxes other than Federal Taxes on Income, (C) Rental for Cars." It divided "actual expenses" into ten cost groups and stated that each group "shall include direct and indirect expenses pertaining thereto."

An amendment to the Uniform Service Contract, Appendix A, became effective January 1, 1956. As amended, the pertinent provisions of Appendix A provided:

"*Expenses*

Expenses to be accounted for under this contract shall include the following:

(a) Operating Expenses;

(b) Taxes other than Federal Taxes on Income;

(c) Rental for Cars.

Expenses relative to operations in Mexico are excluded.

Assignment to Railroads

Actual expenses shall be segregated into the following general cost groups:

I Car Repairs-Shop (separately by classes of cars)

II Car Repairs-Yard (separately for Electrical and Other)

III Car Distribution

IV Car Cleaning

V Conductors

VI Porters

VII Linen, Laundry and Car Supplies

VIII

(a) Advertising

(b) Traffic (Tariffs) and Revenue Accounting
IX Car Ownership (separately by classes of cars)
X Commissary

Each of the above groups shall include direct and indirect expenses pertaining thereto, as well as appropriate proportions of district and general administrative expenses and taxes, other than Federal taxes on income, as provided for in Pullman's 'Classification of Accounts' as prescribed by the Interstate Commerce Commission."

10. After the effective date of the Uniform Service Contract, Pullman prepared a System of Accounts and submitted it to the Interstate Commerce Commission ("ICC") for approval. On October 4, 1950, the ICC entered an order approving this System of Accounts. Pullman was permitted by the terms of the ICC order to apply the system retroactively to January 1, 1950. Since that time Pullman has been required by the ICC to abide by the System of Accounts.

11. As noted in finding 9, *supra*, Appendix A to the Uniform Service Contract provides that for purposes of assigning expenses to the railroads, the expenses shall be divided into various cost groups and that each shall include certain expenses as provided for in Pullman's "Classification of Accounts." This Classification of Accounts is also known as Pullman's System of Accounts and it will be referred to here as such. Said System of Accounts established several categories of accounts, including property accounts, revenue accounts, expense accounts, income accounts, earned surplus accounts and balance sheet accounts. Each of those categories contains accounts in which specific items are to be included. Appendix No. 1 to the System of Accounts established various clearing accounts. Pullman charged the separation payments that are disputed here to one of those clearing accounts—6-22, General Administration—which provides:

"This account shall include the general administrative expense that is not includible in other accounts. The expense[s] assignable to this account are as follows:

"(a) Salaries of officers.—The pay of the president, vice presidents in charge of accounting and operations, general counsel, secretary, treasurer, general auditor, auditor of disbursements, director of sanitation, relief and safety, and assistants, and officers whose duties are such that they cannot be specifically charged.

"b) Salaries of clerks and attendants.—The pay of chief clerks, clerks stenographers, etc. in offices of the officers listed in the above paragraph (a).

"(c) Other expenses.—Pensions and relief expenses not otherwise provided for; traveling and other expenses of employes included in paragraphs (a) and (b) above; director's fees and expenses; telegraph expense and telephone toll service; directories, periodical law books and other expenses. Arbitration expense borne by the Company and sundry licenses; taxes and injury expense to employes that cannot be localized to specific accounts; also the applicable proportion of clearing accounts.

"The expense shall be apportioned to the expense accounts (excluding car ownership) on the basis of total charges to each acount, including charges redistributed to those accounts from the several clearing accounts."

The defendants contend that Pullman should have accounted for the separation payments in an earned surplus account—613. Miscellaneous Debits—which provides:

"This account shall include all decreases in corporate resources not properly deductible from current income. Among these are: loss upon disposition of land, investment securities, or noncarrier property, or the conversion of land to noncarrier use; loss in the reacquisition of funded debt at a premium; unextinguished discount on funded debt when reacquired; payment of old accounts previously written off; and fines or penalties not provided for elsewhere."

It appears that if the separation payments had not been charged to that account the user-railroads would not have been billed for that expense.

DECLINE IN TRAFFIC.

12. During the years following World War II, travel in the United States underwent substantial change. Millions of dollars were expended in the construction of four-lane intercity highways. A larger percentage of the population became automobile owners and used them with increasing frequency to travel between cities and states, both for business and for personal reasons. At the same time, with the development of better and faster airplanes and the construction of commercial airports at a substantially increased number of locations, airplane travel increased substantially. On the other hand, the post-war decline of intercity railroad passenger travel was virtually uninterrupted, with the exception of the Korean War period.

13. During the post-World War II years, the decline of Pullman's business was also virtually uninterrupted, with the exception of the Korean War period. Its operating revenues were $132,593,965 in 1946; $95,590,989 in 1956; $50,355,655 in 1962; and $17,778,168 in 1968. It operated 5,531 cars in 1946; 2,666 in 1956; 1,114 in 1962; and 425 in 1968. It had 36,982 employees in 1946; 16,793 in 1956; 6,392 in 1962; and 2,945 in 1968.

WITHDRAWALS OF PARTICIPATING RAILROADS.

14. Under the Uniform Service Contract, a railroad had the right to withdraw wholly or partially from the contract and to assume the functions theretofore served by Pullman under the contract. If a railroad withdraw completely, for which six months' written notice to Pullman was required, it would thereby undertake to furnish and operate its own sleeping cars and to maintain them in shops of its own choosing. The railroads also had the option, for which they customarily gave 60 days' written notice to Pullman, of withdrawing partially and thereafter operating the cars themselves with their own conduct[or]s

and porters, while continuing to obtain cars from and having them maintained and shopped by Pullman.

15. Effective July 1, 1958, the New York Central exercised its right to withdraw completely from Pullman service on its local lines—service confined to the lines of a single railroad—and on all but four of its joint lines—service on the lines of more than one railroad. Although the New York Central was then Pullman's second largest customer, representing somewhat less than one-sixth of its total business, Pullman assured the other contract railroads that it was able to effect economies which would prevent the New York Central withdrawal from increasing the cost of Pullman service to its other customers. Some railroads which were then considering withdrawing on account of the New York Central withdrawal did not then do so.

16. In the years that followed the withdrawal of the New York Central, Pullman, at the request of various railroads, prepared studies and participated in the preparation of studies, comparing the cost of Pullman service with that which the railroads might incur if they withdrew partially or completely from the Uniform Service Contract. Nonetheless, there was no further significant withdrawal from Pullman service until the Pennsylvania, after litigating its right to do so for five years following giving notice on May 29, 1962, withdrew partially on its local lines on August 1, 1967. At the time of the 1962 notice of partial withdrawal, the Pennsylvania was Pullman's largest user of sleeping car service and accounted for more than 15 per cent of Pullman's total operations.

17. On April 1, 1968 the New York, New Haven and Hartford Railroad Company notified Pullman that it wished to withdraw partially from Pullman service, effective June 1, 1968, on its local lines and on those lines that it operated jointly with Penn-Central. A corresponding notice was received from Penn-Central partially withdrawing on its joint lines with the New York, New Haven and Hartford. By notice of April

22, Penn-Central notified that it would withdraw completely on its local lines. However, Penn-Central continued to have full Pullman service on all joint lines with railroads other than the New York, New Haven and Hartford.

18. In the spring and summer of 1968, the Penn-Central put pressure on a number of eastern and southern railroads with which it maintained joint line service to join it in withdrawing completely from Pullman service. While neither the Penn-Central nor any other eastern or southern railroad gave notice at that time of complete withdrawal, in late August 1968 the Illinois Central, the Louisville & Nashville, the R. F. & P. and the Seaboard, as well as the Penn-Central with respect to the remainder of its joint lines, gave Pullman notice of partial withdrawal effective November 1, 1968, which they later agreed, at Pullman's request, to make effective as of January 1, 1969.

19. In 1958, 1963, 1965, 1966 and again in 1967, the Great Northern and the Northern Pacific, and the Burlington which they jointly owned, compared the cost of Pullman service with that which they might provide themselves. In December 1967, their joint committee studying the comparative costs recommended to the operating vice-presidents of the railroads that a partial withdrawal be effected. It made no recommendation as to complete withdrawal. During 1967 these railroads accounted for 14.2% of Pullman's operations. The operating vice-presidents, however, referred the matter back to the committee for further study.

20. On July 26, 1968, the joint study committee recommended that the railroads serve on Pullman notices of partial withdrawal and six months' notices of complete withdrawal at the earliest opportunity. This recommendation was accepted by the president of the Northern Pacific. However, since the president of The Great Northern expressed a desire to study the matter further, and since it was understood that the three railroads would act jointly, no notice of withdrawal was then

served by any of the three railroads; and, as of September 27, 1968, no joint decision by the management of the three railroads had been reached as to either a partial or a complete withdrawal.

21. Following a discussion between the chief executives of the Seaboard and the Penn Central, arrangements were made by the president of the Association of American Railroads for a meeting of the chief executives of the railroads in Washington, D. C., on September 27, 1968, to discuss the Pullman situation. The arrangements were made with a view to forestalling a unilateral complete withdrawal by any of the railroads, which could increase the cost of Pullman service to those remaining under the Uniform Service Contract, and to promote joint, orderly action by the contract railroads, when and to the extent that the liquidation of Pullman might become appropriate. George Bohannon, Pullman's president, was invited to attend. At the meeting, Bohannon urged that it was in the best interest of the contract railroads to continue to utilize Pullman services. He suggested that the railroads which had recently given notice of partial withdrawal cancel their notices. He was advised that the railroad executives would consider his views in that regard.

22. The railroads whose notices of partial withdrawal were outstanding on September 27, 1968 did not cancel their notices following the meeting held on that date. Within a few weeks, additional railroads served notice of partial withdrawal. By October 28, 1968 railroads using a substantial majority of Pullman's sleeping car services had either served or intended to serve notices of partial withdrawal effective January 1, 1969. On that date Bohannon sent a letter to the Pullman contract railroads in which he stated that it would be "impractical and uneconomical for Pullman to attempt to continue full service in the remaining limited situations and it is therefore expected that these railroads [that have not served notices of partial withdrawal] will also promptly serve their notices requesting a partial form of service to be effective January 1, 1969." By that date,

if not before, it thus became clear that only a partial form of service would be performed by Pullman after January 1, 1969.

23. On November 13, 1968, Bohannon informed the C&O-B&O that it was his opinion that the partial withdrawal of all railroads which had been noticed for January 1, was, in the minds of some of the chief executive officers of the railroads, a probable "first step to complete take over" of Pullman's sleeping car service.

24. When the notices of partial withdrawal became effective on January 1, 1969, Pullman's business was confined to furnishing, maintaining and shopping cars. With its business so confined, Pullman no longer had occasion to employ conductors or porters. It did, however, have a need to employ some shopcraft workers, shop supervisors, and some of the clerks it had theretofore employed.

25. While Pullman had, prior to January 1, 1969, disposed of all of its other shopping facilities, it retained its Calumet shop which was the largest and best equipped facility for the shopping of sleeping cars in the United States.

COMPLETE WITHDRAWAL BY THE REMAINING RAILROADS.

26. On November 5, 1968, the Union Pacific recommended to the Southern Pacific and the Milwaukee, with which it operated joint lines, that the three railroads give six months' notice of complete withdrawal to Pullman on December 1, 1968. On November 22, 1968, Mr. Bohannan had learned from Mr. Quinn, President of the CB&Q, that it was probable that the Northern Lines would withdraw completely from the Uniform Service Contract ("USC"), effective August 1, 1969. Bohannon advised Mr. Crippen, President of the Milwaukee, that he expected that to happen. While the Milwaukee was reluctant to join the other two railroads in giving the notice, and requested and obtained from them an extension of time to permit it to study the matter further, when it appeared that the Union Pacific

and the Southern Pacific were adamant, it joined them in serving a six months' notice on approximately December 27, 1968, effective July 1, 1969. The Santa Fe also served a similar notice on December 23, 1968, to become effective immediately upon and concurrently with any other notice of withdrawal that was served thereafter.

27. The notices served by the Union Pacific, Southern Pacific, Milwaukee, and Santa Fe made it apparent that an agreement as to joint, rather than unilateral, action by the Pullman contract railroads had not been achieved at the meeting on September 27, 1968. Said notices would tend to intensify the concern of the other contract railroads that if the four railroads which had served notice of complete withdrawal actually withdrew, the cost of Pullman service to those who remained might be substantially increased, especially if others also withdrew completely. With these considerations in mind, arrangements were made for a further meeting of the chief executives of the Pullman contract railroads to discuss the Pullman situation in Boca Raton, Florida, on January 31, 1969. Bohannon was again invited to attend. Prior to January 16, 1969, F. J. Boeckelman, an employee and subsequently president of Pullman, and Bohannon knew that the major railroads were considering withdrawing from the USC, and Bohannon told Boeckelman at that time that if the railroads were going to do this on a wholesale basis that there ought to be a uniform withdrawal date rather than one railroad doing it one month and another doing it the next month. Prior to going to Boca Raton, Bohannon told Boeckelman that a topic of discussion would be whether the railroads were going to present a "uniform" notice of withdrawal from The Pullman Company in 1969.

28. At the meeting at Boca Raton, the Seaboard, which had a continuing concern as to its inability to shop sleeping cars in the event Pullman went out of business, tried to persuade the four western railroads which had served notice in December 1968 of their complete withdrawal to cancel their notices and not to

withdraw until such time as the contract railroads agreed it was in their interest as a whole to withdraw jointly. After it became apparent that the four western railroads would not cancel their notices, all the contract railroads, including the Great Northern, the Northern Pacific, and the Burlington, which had not theretofore served notices of their intent to withdraw completely, indicated their decision to withdraw and to do so effective August 1, 1969. It thus became certain at this time that the rendition by Pullman of a partial form of sleeping car service would come to an end; that Pullman would go out of business; and that it would go into liquidation.

29. Within a short time after the Boca Raton meeting, the four western railroads revised their notices to make them effective August 1, 1969, and all other contract railroads gave notice of complete withdrawal effective on the same date. Pullman continued to furnish and maintain cars until August 1, 1969. Since then, it has not rendered any sleeping car services to the contract railroads, but has instead been in the process of winding up its affairs, which process commenced after the Boca Raton meeting.

30. After February 1, 1969, Pullman had the ability to continue shopping sleeping cars with its then force of shopcraft employees. Pullman determined, however, to continue to shop only cars which were in the Calumet Shops on February 1 and to lay off such employees as such cars were completed.

THE VARIOUS JOB TERMINATION AGREEMENTS.

Background: Union Agreements with the Railroads.

31. By reason of the continuing decline in the number of conductors employed by Pullman, the Order of Railway Conductors ("Conductors") served Pullman with a notice on November 7, 1960, pursuant to Section 6 of the Railway Labor Act, to initiate bargaining for job protection. The notice sought, among other things, the extension of the benefits of the Washington Job Protection Agreement, executed by most United States railroads and railroad unions on May 21, 1936, to conductors who lost their jobs with Pullman as a result of the discontinuance of a conductor position for any reason.

The Washington Job Protection Agreement was limited to railroad employees who lost their jobs as an incident to the consolidation, merger or pooling of railroad facilities by two or more railroads. The agreement provided that any employee who retained their jobs, following a consolidation, merger or pooling of facilities, would not, for a period of five years thereafter, be placed in a worse position with respect to compensation and working conditions than they had enjoyed before. It provided that any employees who lost their jobs, following a consolidation, merger or pooling of facilities, would receive 60% of their compensation for period up to five years, or, in the alternative, a lump-sum separation allowance.

32. When Pullman refused to agree to afford the union the job protection it demanded for its members, the Conductors progressed their demands to the point of setting a strike date. After the strike was enjoined and an Emergency Board appointed, the Board recommended that Pullman, the Conductors and the railroads enter into an agreement affording some job protection to conductors who lost their jobs with Pullman as an incident to the withdrawal of Pullman contract railroads. Ultimately, on December 9, 1963, two days before the date set by the Conductors for a strike, the National Railway Labor Conference, the bargaining arm of the railroads, entered into an agreement [with] the Conductors, known as the Wolfe-Wise Agreement. Under the terms of the agreement, which was subsequently ratified by thirty-one railroads, including the Great Northern and the Northern Pacific, if a conductor lost his job as a result of the withdrawal of a Pullman contract railroad, he had the option of receiving 60% of his compensation for a period not to exceed twenty-four months or the lump-sum separation allowance provided in the Washington Job Protection Agreement. Pullman was not a party to the agreement.

33. The Brotherhood of Sleeping Car Porters ("Porters"), confronted with a continuing decline in the number of porters employed by Pullman, initiated its job protection demands on Pullman that there be no reductions in forces except those consequent to normal attrition, and that any porter affected by a change in Pullman's operations be granted the benefits of the Washington Job Protection Agreement, with a Section 6 notice served March 8, 1962. When Pullman refused to agree to provide job protection for the porters, the Porters pressed their demands until, on December 17, 1963, three days before the date set by the Porters for a strike, the National Railway Labor Conference entered into an agreement with the Porters, known as the Wolfe-Randolph Agreement. The agreement, which was subsequently ratified by thirty-three railroads, including the Great Northern and the Northern Pacific, provided that porters offered employment by a withdrawing Pullman contract railroad would retain the same seniority, compensation, and vacation rights as they had at Pullman. Unlike the Wolfe-Wise Agreement, the Wolfe-Randolph Agreement did not provide separation pay to those who lost their jobs consequent to the withdrawal of a Pullman contract railroad. Pullman was not a party to the agreement.

34. The six shopcraft unions (collectively the "Shopcrafts") and the Brotherhood of Railway and Steamship Clerks ("Clerks") each served Pullman with a Section 6 notice seeking job protection which was identical to the notices served on the railroads nationally. The Shopcrafts did so on October 15, 1962. The Clerks did so on May 31, 1963. In each case, Pullman persuaded the unions to await the outcome of the national negotiations before pressing their demands. On September 25, 1964, the Shopcrafts obtained an agreement from the railroads extending the job protection and separation pay allowance provisions of the Washington Job Protection Agreement to abandonment and discontinuances of facilities and services and transfers of work. The Clerks obtained an agreement from the railroads

on February 7, 1965. That agreement required railroads to maintain their forces intact unless their business declined 5%, measured in gross operating revenues and net revenue ton-miles. It also gave fifteen-year employees which the railroads proposed to transfer or reassign the option of accepting the transfer or reassignment with their compensation protected, or resigning and accepting a lump-sum separation allowance.

THE AGREEMENT WITH THE PORTERS AND THE CLERKS.

35. After the execution of the Wolfe-Randolph Agreement on December 17, 1963, the Porters on May 25, 1964 served a Section 6 notice on Pullman which was substantially the same as that served by the Clerks on May 31, 1963. By that means, the Porters renewed their demand for a limitation on reductions in forces and the application of the provisions of the Washington Job Protection Agreement to porters affected by a change in Pullman's operations, which it had sought in its Section 6 notice of March 8, 1962 but had not obtained in the Wolfe-Randolph Agreement. Negotiations with respect to that aspect of the Porters' May 25, 1964 Section 6 notice commenced on April 25, 1965, following the execution of the national agreement with the Clerks on February 7, 1965. Negotiations with respect to the Clerks' May 31, 1963 Section 6 notice were reopened on March 8, 1965. In both instances, Pullman refused to agree to the application of the force reduction provisions of the February 7, 1965 national agreement to it, on the ground that the net revenue ton-mile criterion of that agreement had no relevance to Pullman's operations.

36. When Pullman persisted in its opposition to the freight ton-mile criterion at a joint conference with the Porters and the Clerks in November 1966, both unions invoked the services of the National Mediation Board, which held a joint conference in January 1967. No agreement was reached. After the Porters set a strike for October 13, 1967, the National Mediation Board arranged a conference which was held on October 11, 1967.

Although Pullman again refused to agree to the force reduction terms of the February 7, 1965 agreement, it did indicate a willingness to enter into a lump-sum separation pay agreement if the Pullman contract railroads approved its doing so. Pullman's draft of such an agreement was rejected on November 28, 1967 by the Porters which continued to insist on the terms of the February 7, 1965 agreement.

37. On November 14, 1967, Pullman reached a tentative understanding with the Clerks as to a separation pay agreement. The execution of that agreement was conditioned by Pullman on its obtaining the National Railway Labor Conference's approval of its terms, and on its obtaining authorization from the Pullman contract railroads to bill any separation payments made pursuant to its terms. Thereafter, Pullman secured the agreement of the Clerks to revisions suggested by the National Railway Labor Conference, and the approval of the Conference to the agreement as revised.

38. A short while later, Pullman rejected a counter-proposal by the Porters and the National Mediation Board arranged a joint conference of Pullman, the Porters and the Clerks on March 5, 1968. At that conference, the Board persuaded the Porters to accept the terms of a separation pay agreement. Thereafter, Pullman obtained the National Railway Labor Conference's approval of the submission by Pullman to the railroads of the draft of the separation pay agreement with the Porters.

39. On March 13, 1968, Pullman sent a letter to the chief executives of the Pullman contract railroads, advising that it would enter into the separation pay agreements with the Porters and the Clerks if railroads which together incurred more than fifty percent of Pullman's 1967 expenses of operations approved its doing so. It indicated that any expenses incurred pursuant to the agreements, if executed, would be charged to the contract railroads in proportion to their 1967 percentage of Pullman's operations.[1]

40. In response none of the contract railroads, including the Great Northern and the Northern Pacific, objected to the indicated method of allocating the separation pay expense. Railroads which together incurred more than fifty percent of Pullman's 1967 expenses of operations did object, however, to one or more features of the draft agreements, including the provision that those furloughed by Pullman after November 13, 1966 were eligible for separation pay and the provision that the railroads, under implementing agreements, pay a separation allowance of $2,500 to employees offered employment by a railroad.

41. When the National Mediation Board was advised of the responses Pullman had received, the Board proposed that the draft agreements be modified so as to eliminate one year of retroactivity and to provide for the payment by Pullman, rather than the railroads, of a separation allowance of $2,500 to employees taken over by the railroads. That proposal was accepted by the Porters and the Clerks, and by Pullman subject to the submission of the revised drafts to the contract railroads for approval . Pullman was advised on May 3, 1968 that the Porters and the Clerks had set May 28, 1968 as the date on which they would strike if Pullman did not enter into the agreements. The railroads were informed of this strike date in a letter of May 16, 1968 from Bohannon.

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1. In late 1967, Pullman management, particularly Boeckelman, was of the opinion that Pullman would need the approval of the railroads for it to recoup from the railroads whatever amounts Pullman would pay to employees under separation pay agreements. Earlier, Boeckelman and Bohannon had considered securing an amendment to the Uniform Service Contract to accomplish this; however, they apparently concluded that such an amendment could not be secured from the railroads, and no amendment was submitted. An alternative was devised in late 1967, in discussions between Bohannon and Boeckelman, to the effect that the proposed separation pay agreement would be submitted to the roads, and if a majority of the roads approved, Pullman would execute the agreement and recover its costs from all of the using railroads.

42. The revised agreements were submitted by Pullman to the chief executives of the contract railroads on May 16, 1968. Thereafter, execution thereof by Pullman was approved by contract railroads, including the Northern Pacific, which together incurred 91.2464% of Pullman's 1967 expenses of operations. The Great Northern did not approve the execution of these agreements. Approval by some of the railroads resulted in part from fear that a strike would take place if no agreement were reached and that such a strike would tie up the nation's freight as well as passenger service.

43. Pullman entered into substantially identical separation pay agreements with the Porters and the Clerks on May 27, 1968. As executed, the agreements recognized the right of Pullman to reduce its forces as required by emergency conditions and technological, operational or organizational changes, but protected those covered by the agreements against being placed in a worse position with respect to compensation. As to all employees in active service with Pullman on November 13, 1967, the agreements provided that employees offered employment by a railroad would receive a lump-sum separation allowance of $2,500 from Pullman if they accepted the employment, and nothing if they did not. The agreements provided that furloughed employees would receive separation pay equal to 360 days' pay, depending on their length of service. The execution by Pullman of these agreements set a pattern for other unions whose members were employed by Pullman.

THE AGREEMENT WITH THE CONDUCTORS.

44. On January 30, 1968, the Conductors initiated a demand, like that of the Porters and the Clerks, for the application of the force reductions provisions of the February 7, 1965 agreement to its members, by serving a Section 6 notice on Pullman. At a conference with Pullman held shortly thereafter, the Conductors agreed not to press their demand until after

the negotiations of the Porters and the Clerks had been concluded, and a pattern had thereby been established. At that meeting Pullman gave the Conductors a copy of the draft separation agreement with the Porters, which draft was modified to apply to the Conductors.

45. After Pullman executed separation pay agreements with the Porters and the Clerks on May 27, 1968, the Conductors contracted Pullman and arranged a further conference which was held on June 3. At that conference, the Conductors asserted that they were entitled to a separation pay agreement like those executed on May 27. Pullman delayed the execution of an agreement with the Conductors which would follow the pattern set by the May 27 agreements, thereby forcing the Conductors to consume the time involved in taking the steps which the Railway Labor Act made a condition precedent to setting a strike date. Pullman took the position that a strike date had to be set in order to get the matter before the railroads which had to approve the assumption of the separation allowances.

46. The Conductors were not able to set a strike date until after the National Mediation Board closed its file on August 14, 1968. They then, on August 20, set a strike for September 14. Only thereafter did Pullman submit a draft of a separation pay agreement with the Conductors to the Pullman contract railroads for approval. Railroads, including the Northern Pacific, which together incurred 65% of Pullman's 1968 expenses of operations, approved Pullman's entering into the agreement, in order to avert the strike which the Conductors expressed an intention to press to the point of disrupting the nation's railroads. The Great Northern disapproved the execution of the Conductors' agreement. Based on the approvals received, Pullman, on September 11, 1968, executed a separation pay agreement with the Conductors, which was patterned after the Porters' and Clerks' agreements and substantially similar to them.

47. In submitting the draft separation pay agreement with the Conductors to the Pullman contract railroads for approval,

Pullman stated that expenses incurred by it pursuant to the agreement would be charged to the Pullman contract railroads in proportion to their 1968 percentages of Pullman's expenses of operations. None of the responses to Pullman's letter of submission, including those of the Great Northern and the Northern Pacific, expressed any objection to the charging of the expenses to the Pullman contract railroads.

THE AGREEMENT WITH THE SHOPCRAFT UNIONS.

48. Following the execution of the national agreement with the Shopcrafts on September 25, 1964 (para. 32 *supra*), the Shopcrafts met again with Pullman with respect to its Section 6 notice of October 15, 1962. At that meeting, Pullman refused to agree to the application of the provisions of the September 25, 1964 agreement to it in the event a Pullman contract railroad withdrew. After the Shopcrafts set a strike for March 31, 1965, the Shopcrafts took down their strike notice, negotiations with Pullman were suspended, and the National Railway Labor Conference undertook negotiations with the Shopcrafts which culminated in the execution of an agreement between them on January 26, 1966. That agreement (the "Wolfe-Fox Agreement") provided that employees transferred with the work or deprived of employment following a withdrawal by a Pullman contract railroad would receive all of the protective benefits of the September 25, 1964 agreement, except a separation allowance. Pullman was not a party to the Wolfe-Fox Agreement, which was ratified by twenty-five railroads, including the Great Northern and the Northern Pacific.

49. After the Wolfe-Fox Agreement was ratified by the railroads, Pullman, on July 19, 1966, entered into an agreement with the Shopcrafts which applied the provisions, including the separation allowance provision of the pattern agreement of September 25, 1964, to Pullman, except in the event a Pullman contract railroad withdrew.

50. On June 4, 1968, eight days after the execution of the Porters' and Clerks' pattern agreements of May 27, 1968, the Shopcrafts asked Pullman to enter into a separation pay agreement affording the same benefits to them to the extent those benefits were not already provided in the agreement of July 19, 1966. With a view to delaying the time when circumstances might force Pullman to execute such an agreement, Pullman declined to do so, and thereby relegated the Shopcrafts to expending the time involved in exhausting the procedures required by the Railway Labor Act as a condition precedent to setting a strike date.

51. As of August 7, 1968, Mr. Robert E. Duckworth, General Chairman of one of the Shopcraft unions and Secretary-Treasurer of System Federal 122, an affiliate of the Railway Employees Department, AFL-CIO, came to the conclusion, and so reported to the President of the Railway Employees Department, AFL-CIO, that "Pullman was going out of business."

52. The Shopcrafts did not initiate the procedures specified in the Railway Labor Act until it served a Section 6 notice on August 31, 1968, after Pullman had already submitted a draft of the Conductors' separation pay agreement to the Pullman contract railroads for approval. The union sought to have the agreement apply to employees furloughed by Pullman subsequent to November 1967. Twelve days later, Pullman advised the Shopcrafts that its notice was technically deficient.

53. On September 16, 1968, the Shopcrafts served a new Section 6 notice. When Pullman refused to submit a separation pay agreement to the Pullman contract railroads for approval until the Shopcrafts had exhausted the procedures required by the Railway Labor Act, the Shopcrafts exhausted those procedures as rapidly as possible since they feared Pullman would go out of business, and set a strike date for December 31, 1968. However, when Pullman indicated that it needed thirty days in which to determine whether the contract railroads would ap-

prove the execution of a separation pay agreement, the Shopcrafts, on December 16, set the strike date for January 17, 1969.

54. After obtaining the consent of the National Railway Labor Conference, Pullman, on December 19, 1968, advised the contract railroads that it would enter into the then draft separation pay agreement with the Shopcrafts if railroads which together incurred more than fifty percent of Pullman's estimated expenses of operation for the first six months of 1968 approved its doing so. The railroads were informed that the effective date had not been agreed upon, but that the union was insisting that it be retroactive to October 17, 1968. A provision for payment of $2,500 to employees who accepted employment with a railroad was also included.

55. Railroads accounting for 68.1543 percent of Pullman's estimated expenses of operation for the period January 1 through June 30, 1968 did not approve the agreement as submitted. Further discussions with the unions resulted in a proposed agreement having an effective date of January 1, 1969 and which deleted the provision for a transfer allowance of $2,500. Pullman did not submit the modified agreement to the contract railroads for approval. It did re-tally the responses to its letter of December 19, concluding that roads accounting for 74.5535 percent of operating expenses would agree in light of the changes in the agreement. On January 16, 1969 Pullman and the Shopcraft unions entered into the agreement as modified.

The Agreement with the American Railway Supervisors Association.

56. The American Railway Supervisors Association ("Supervisors") initiated its demand for a separation pay agreement with a notice served on June 17, 1968, three weeks after the execution of the May 27, 1968 agreements. When Pullman challenged the notice, the Supervisors served a new notice on July 20, which sought a separation pay agreement patterned

on the Clerks' agreement. In early October, after the Supervisors progressed their demand for a separation pay agreement to the point of setting a strike date, Pullman agreed to enter into a separation pay agreement with the Supervisors like whatever agreement it ultimately entered into with the Shopcrafts, if the Supervisors took down their strike notice, which they did. After the submission by Pullman of the Shopcrafts' agreement and the substance of the Supervisors' agreement to the contract railroads on December 19, 1968; and after the separation pay agreement with the Shopcrafts had been executed, Pullman on January 29, 1969, executed a separation pay agreement with the Supervisors like that executed with the Shopcrafts.[2]

The Agreements with Non-Union Employees.

57. In June 1967, Pullman entered into executive employment contracts with twenty-one of its executives and key employees. These agreements required Pullman to maintain the then existent salary of each of the employees at its current level and in the event of termination prior to normal retirement the employee would be paid monthly a sum equal to the difference between what the employee would have received if he retired at normal retirement date and the amount he was entitled to receive under the Pullman Pension Plan as of the date of actual termination. On November 4, 1968, the board of directors of Pullman approved a resolution that its non-union employees be paid the pattern separation allowance. At that same meeting the declaration of a dividend from paid-in

2. A copy of the Supervisors' Agreement was not submitted to the contract railroads. However, it had been stated in Bohannon's cover letter that if the agreement with the Shopcraft unions was entered into, a similar agreement would be reached with the Supervisors. The last sentence of that letter asked for advice "as to whether your railroad does or does not approve Pullman executing the proposed agreements with its shop craft unions and the supervisors' union." It appears from this that the substance of the Supervisors' agreement was before the contract railroads and their advice on the matter was requested.

surplus, which had been authorized by the shareholders, was postponed.

ABSENCE OE AGREEMENT WITH LAUNDRY WORKERS.

58. Pullman did not enter into a separation pay agreement with the United Transport Service Employees ("Laundry Workers"). On June 22, 1968, Pullman entered into an agreement settling a wage dispute with the Laundry Workers, which agreement contained a clause barring the Laundry Workers from serving a further Section 6 notice until January 1, 1970. When the Laundry Workers asked Pullman to waive the provision to permit it to serve a Section 6 notice for a separation pay agreement, Pullman refused to do so.

ARM'S LENGTH NEGOTIATIONS.

59. Pullman's negotiations with respect to each separation pay agreement it entered into were at arm's length. On each occasion on which Pullman committed itself to making separation payments, there was no decision to cease the operations involved and Pullman acted with the reasonable expectation that in its operations there would be a need to employ the group of employees to whom it agreed to pay the separation allowances, although the duration of that need was not clear.

SEPARATION PAYMENTS.

60. During the period June 1968 to October 1971, Pullman made separation payments to its employees totalling $15,647,-461.05 in accordance with the provisions of its separation pay agreements and its board resolution of November 4, 1968. It billed its separation pay expenses to the Pullman contract railroads as operating expenses in proportion to their respective shares of Pullman's operating expenses in the years in which the separation pay liabilities were incurred. In the years in

which Pullman's separation pay liabilities were incurred, its operating expenses exceeded its operating revenues without regard to its separation pay expense. The total sum billed by Pullman to the Great Northern for separation pay, but which was not paid, amounts to $537,630.22. The total sum billed by Pullman to the Northern Pacific for separation pay, but which was not paid, amounts to $458,282.17.

61. Pullman followed the practice of acounting for gain or loss on sales of land, buildings, equipment (including cars) and material and supplies which had been employed in its operations by crediting the gains or charging the losses to corporate income or surplus and not to operations.

62. In 1969, Pullman paid insurance premiums in connection with an employees' group insurance program and a pension plan. Of the amounts so paid, $568,222 was charged to surplus and $26,947 was charged to operations.

II.

This Court has jurisdiction of the parties and the subject matter of this action.

Counts I and II of the complaint and Count I of the counterclaims of the Great Northern and the Northern Pacific raise essentially the same issues and can be disposed of together. Between May 9, 1969 and December 30, 1969, Pullman submitted statements to the Great Northern and the Northern Pacific for alleged operating expenses. These statements included Pullman expenses arising out of severance payments made by Pullman to certain of its employees. Pullman's theory is that under the Uniform Service Contract the railroads were obligated to pay all operating expenses and that, since the separation pay agreements were entered into at a time when there was a need for the employees and were necessary to avert strikes, the costs associated with those agreements are reimbursable operating expenses.

In their answers to the complaint, in their affirmative defenses thereto, and in Count I of their counterclaims, Great Northern and Northern Pacific have taken the position they are under no obligation to reimburse Pullman for separation payments that were made once it was determined not to operate or to cease Pullman sleeping car operations in the United States or to liquidate, dissolve or cause the cessation of such operations. This Court has found that the decision to cease all operations and to liquidate Pullman was made at the Boca Raton meeting on January 31, 1969. See findings 28, 29, *supra*. At trial and in their post-trial briefs, counterplaintiffs have taken the position that separation payments made prior to the final determination to liquidate Pulln an should not be charged to them.

Count I of the counterclaims alleges that certain payments were attributable to liabilities undertaken subsequent to the time when Pullman decided to cease operations and liquidate. Granted that some of the separation pay agreements were entered into after partial withdrawal by all the railroads was a fait accompli, this Court has found that at the time each of the separation pay agreements was entered into, there had been no decision to terminate the operations involved and that there was a need to employ the group of employees to which it was agreeing to pay the separation allowances. Finding 56, *supra*. In light of this finding, it is only the actual payment of separation allowances that is relevant here.

The term "operating expenses" is not defined in the Uniform Service Contract ("USC"). Even assuming *arguendo* that the parties intended to have the railroads guarantee against operating losses by Pullman (Stip. Ex. F, 268 I. C. C. 473, 479), this does not eliminate the necessity of defining operating expenses or losses. In the absence of either a definition in the contract or an established legal definition of the term "operating expenses," since it is a term of art within the accounting profession and it appears that the parties intended to use it in that sense, parol evidence of usage within the profession is

appropriate when the term is capable of a definite interpretation. *Phillips Petroleum Co.* v. *Payne Oil Corp.*, 146 F. 2d 546, 547 (10th Cir. 1944); *Schrieffer's Motor Serv. Inc.* v. *United Freight Forwarders, Inc.*, 210 F. Supp. 287, 291 (D. Minn. 1962).

Among accountants, there appears to be a generally accepted definition of operating expenses. The term includes those expenses incurred in the conduct of the major activities of a business which are generally recurrent in nature and somewhat normal and dependable in their operation. A non-operating expense is one which is not incurred directly in the conduct of the normal or major operations of the business, does not recur at regular intervals, and is more or less fortuitous in its occurrence.

This Court rejects Pullman's contention that separation payments are operating expenses simply because signing the separation pay agreements was necessary to avert strikes and a need existed for the employees at the time of signing. It is the circumstances existing at the time payments were actually made that determines their treatment under the USC.[3]

There are circumstances under which separation payments are properly considered operating expenses. In deciding whether or not separation payments are operating expenses, the cause of the separations and the materiality of the payments are relevant.

While accountants are in general conceptual agreement about the term "operating expenses," there is considerable subjectivity involved in the decision as to when the separation payments here ceased being operating expenses chargeable to the railroad-users and became instead chargeable to surplus. In short, custom and usage within the accounting profession is not uniform and does not provide definite standards; accord-

3. This is supported by Pullman's treatment of insurance premiums paid on policies that were part of an employees' group insurance program and a pension plan. See finding 62, *supra*.

ingly, expert opinion carries less weight in construing the parties' intent than might otherwise be the case.

This Court is of the opinion that for purposes of deciding the issue, the operations of Pullman should be divided into two parts: (1) the full service that included (a) provision of conductors, porters and other personnel and services required for operation of the cars and (b) supplying and maintaining the cars, and (2) the limited service that only involved supplying and maintaining the cars. This division corresponds to the contractual provisions for partial and complete withdrawal. When a railroad partially withdrew it continued as a Pullman customer for service number 2.

Both aspects of Pullman's operations accounted for a significant portion of its income. The separation pay agreements can be readily identified with either one or the other parts of Pullman's business. There also came a point in time when it became clear that Pullman would cease providing the respective services. After that time the separation payments for employees in that segment of Pullman's business were material in amount. This Court is of the opinion that once it became clear that Pullman was going to discontinue a segment of its business, separation payments to employees in that segment of its operations were no longer operating expenses chargeable to the contract railroads.

For porters, conductors and others associated with operations of the cars, (1)(a) *supra,* the cut-off date for charging the expenses to the railroads would be October 28, 1968. See finding 22, *supra.* The cut-off date for employees not in the above category would be January 31, 1969. See findings 27, 28, *supra.*

Accordingly, judgment is entered in favor of Pullman for those separation payments made to the respective groups of employees before the above cut-off dates. Judgment (including the right to a refund if payments were in fact made in this respect) is

entered in favor of Great Northern and Northern Pacific for any payments made to Pullman in respect of separation payments made to the respective groups of employees after the above cut-off dates. The parties are directed to prepare and submit to the Court within sixty (60) days hereof a draft judgment order setting forth the dollar amounts to which the parties are entitled under this formula.

III.

Count II of each countercomplaint alleges that Pullman, its officers, agents and employees owed Great Northern and Northern Pacific the duty not to incur or pay unnecessary or unwarranted severance pay liabilities to Pullman employees and that unnecessary and unwarranted liabilities were incurred and paid in violation of this alleged duty. The factual findings do not support the allegations that the separation pay agreements were unnecessary or unwarranted and accordingly judgment is entered against the counterplaintiffs and in favor of counterdefendants on Count II of the countercomplaints.

IV.

Count III of each countercomplaint alleges that Pullman was required by the ICC to apply an ICC-approved System of Accounts and that Pullman deviated from that System of Accounts when accounting for severance pay to its employees. It is alleged and admitted by Pullman that the System of Accounts was to be used by Pullman as the basis for distributing expenses under the USC. It is further alleged that Great Northern and Northern Pacific were entitled to rely, and did rely, upon Pullman to determine its operating expenses for billing under the USC in compliance with the System of Accounts.

There is no doubt that Pullman was obligated to maintain the ICC-approved System of Accounts and to make periodic reports to the ICC. In a "letter opinion" dated November 10, 1971, Judge Decker denied Pullman's motion to dismiss Count

III. He noted there that 49 U. S. C. § 20(5) made it unlawful for any carrier to keep its accounts contrary to the rules, regulations or orders of the ICC and that 49 U. S. C. §§ 8 and 9 provide a private right of action for injury resulting from violation of the Interstate Commerce Act.

In order for Great Northern or Northern Pacific to recover as a result of Pullman's alleged failure to comply with its System of Accounts, it must be established that the Uniform System of Accounts determines which expenses are to be charged against the railroads. In short, even if Pullman had not properly accounted for severance pay under its System of Accounts, injury to the participating railroads would not automatically follow.

Section 7(c) of the Uniform Service Contract provides that:

> "[i]f for any Contract Year the expenses allocated to the Railroad plus the 3% return on Pullman's investment allocated to the Railroad, shall exceed the revenues allocated to the Railroad, the Railroad shall pay to Pullman the amount of the deficiency."

It is this section which obligates the railroads to reimburse Pullman for certain expenses. However, that provision by itself does not indicate which expenses are reimbursable and reference to other provisions of the contract is required. The relevant provisions are § 7(a) and Appendix A to the USC. Section 7(a) provides:

> "[w]ithin 90 days after the close of each Contract Year, Pullman shall furnish a statement, by car lines, of revenues, expenses, and a 3% return on Pullman's investment, allocated to the operations on the Lines of the Railroad under this contract, in accordance with Appendix A attached to and made a part of this contract."

Appendix A, as originally adopted and as amended in 1956, provides, *inter alia*, that:

> "[e]xpenses to be accounted for under this contract shall include the following:
>
> (A) Operating Expenses

> (B) Taxes other than Federal Taxes on Income
> (C) Rental for Cars"

Under these provisions, an accounting must precede a determination of what each railroad owes Pullman. Under Appendix A, as amended, the Uniform System of Accounts is material to this accounting, but it only functions to assist in allocating the pooled operating expenses among the participating railroads.

The history of the USC and its predecessor, the Uniform Operating Contract, helps clarify the relationship between the USC and Uniform System of Accounts. The USC, which became effective July 1, 1949, was adopted because the allocation of operating expenses under the Uniform Operating Contract was deemed unfair to some of the participating railroads (Step. Ex. I, 276 I. C. C. 6). The unfairness arose from the fact that pooled operating expenses were being allocated on a car-days-operated basis. To remedy this unfairness, the USC established ten principal categories or cost groups and a number of subcategories. Relevant units of service were assigned to each group. Price tables were also established for each service unit and expenses were to be allocated to individual railroads by applying those prices to the railroad's actual use of service units.

When the USC became effective on July 1, 1949 Appendix A did not make reference to the Uniform System of Accounts. Shortly thereafter, however, Pullman requested the ICC's permission to revise its then existing system of accounts. The purpose of this revision was to eliminate the dual recording of operating expenses that was then necessitated: one set of records under the existing system of accounts for purposes of reporting to the ICC and the other under the USC for purposes of contract settlements between Pullman and the railroads. (Def. Ex. 365-I). Pullman was granted permission by the ICC to institute the proposed USC. See finding 10, *supra*. When Appendix A was amended effective January 1, 1956, specific reference was made to the System of Accounts.

However, the System of Accounts has relevance only in terms of allocating the operating expenses. The allocation of separation payments was made in proportion to the railroads' percentage of Pullman operations in a given year and counterplaintiffs do not complain of this method of allocation. They object instead to the fact that the cost of separation payments was charged to the railroads. Based on the language of the USC and the intent of the parties, the Court is of the opinion that the railroads were required to reimburse Pullman for operating expenses should such expenses exceed revenues and the 3% return on Pullman's investment. Granted that the term "operating expenses" is not defined in the USC, the meaning of that term is not derived from the System of Accounts. Count III of the counterclaims therefore adds nothing of substance to Count I thereof. Based on the foregoing, the counterplaintiffs have not been injured, if as alleged Pullman deviated from its System of Accounts. Accordingly, judgment on Count III of the counterclaims is entered against the counterplaintiffs and in favor of Pullman.

COSTS.

Both parties have asked for assessment of costs. Rule 54(c) provides that costs shall be allowed to the prevailing party unless the court otherwise directs.

Under the circumstances, the Court finds it appropriate and directs that the parties shall compute their total chargeable costs and that these shall be allowed to the parties in the same proportion as their individual recoveries bear to the total of all of the judgments. These computations shall be submitted to the Court within sixty (60) days of the date hereof.

IT IS SO ORDERED.

ENTERED:

/s/ R. W. MCLAREN,
United States District Judge.

Dated: November 15, 1973.